No. 91-2001

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

RICHARD VOGEL,

Petitioner,

vs.

THE CITY OF CINCINNATI

and

SCOTT JOHNSON, CITY MANAGER

and

CIVIL SERVICE COMMISSION OF THE CITY OF CINCINNATI

and

LAWRENCE WHALEN, POLICE CHIEF OF THE CITY OF CINCINNATI

and

THE SENTINEL POLICE ASSOCIATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. When no hiring or promotional quota is authorized by a voluntary consent decree entered into by a political subdivision, does the Fourteenth Amendment to the United States Constitution permit that political subdivision to create a quota, which imposes a societal burden on innocent individuals, in order to meet certain goals for hiring and promoting blacks and females.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner requests that a writ of certiorari be issued to review the decision and judgment of the United States

Court of Appeals for the Sixth Circuit entered on March 13, 1992, which affirmed a decision and order of the United States District Court for the Southern District of Ohio, Western Division, which granted summary judgment to respondents on April 16, 1991 affirming the hiring and promotion practices of the City of Cincinnati Police Division, with regard to a consent decree entered in 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals is contained in the Appendix at 6A, and is reported as *Vogel v. City Of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). The opinion of the United States District Court for the Southern District of Ohio, Western Division is contained in the Appendix at 1A, and is not reported. It is cited as *Vogel v. City of Cincinnati*, No. C-1-89-683 (S.D. Ohio April 16, 1981)

JURISDICTION

The final judgment of the Court of Appeals was entered on March 13, 1992. Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this cause, by a writ of certiorari, is conferred on this Court by 18 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(See appendix for verbatim recitation)

1. Fourteenth Amendment to the United States Constitution

2. 42 U.S.C. § 1983 – Civil Action for Deprivation of Rights
3. Ohio Rev. Code Ann. § 124.26 (Baldwin 1991) – Eligible lists; veteran's preference; existing employees who pass exam
4. Ohio Rev. Code Ann. § 124.27 (Baldwin 1991) – Appointments; certified and provisional; probationary period
5. Ohio Rev. Code Ann. § 124.90 (Baldwin 1991) – Waiver of laws to avoid federally prohibited discrimination

STATEMENT OF THE CASE

Petitioner, Richard Vogel filed his original complaint in the United States District Court for the Southern District of Ohio, Western Division on October 5, 1989, prior to the swearing in of the 1989 Cincinnati police recruit class. Petitioner was excluded from that class. Certain other individuals, who were either black or female, were accepted into the class even though they received lower scores than Petitioner on the required written examination.

Under Ohio law, which controls the City of Cincinnati (hereafter sometimes the "City") civil service, individuals must be placed on an eligible list "in order of their relative excellence as determined by examination." (Ohio Rev. Code Ann. § 124.26 (Baldwin 1991)) (Appendix 47A). Ohio Rev. Code Ann. § 124.27 (Baldwin 1991) (Appendix 48A) requires that vacant positions be filled from the eligible list by hiring one of the three candidates highest on the list for each available position.[1]

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[1] Ohio law mandates a requirement for screening new recruits called "The Rule of Three." This rule requires that new

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The original suit was against all of the named respondents, with the exception of the Sentinel Police Association. Subsequent to the filing of the lawsuit, the Sentinel Police Association moved to intervene. Neither the Petitioner nor the Respondents objected and The Sentinel Police Association was made a party defendant. The Sentinel Police Association represents black Cincinnati police officers.

Petitioner filed a Motion for Summary Judgment in the District Court. Defendants and Intervenors responded with Cross-Motions for Summary Judgment. Subsequently, pursuant to a request by the District Court, all parties filed supplemental memoranda. On April 15, 1991, the lower court issued its decision overruling Petitioner's Motion for Summary Judgment and granting Summary Judgment in favor of all of the Respondents. The opinion of the lower court (Appendix 1A) failed to discuss the legal issues raised in the Petitioner's motion. It merely found that the goals of the consent decree had not yet been met, without considering the underlying arguments regarding the methods adopted to meet the goals and the effect those methods had on Petitioner.

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recruits be hired from one of the three recruit candidates highest on the list. An individual is dropped from the list after having been passed over three times. Since one of the three must be hired, the new recruits are still hired in the general order of excellence. Individuals much further than three positions down the list from petitioner's position were included in the 1989 recruit class. Respondent passed the Rule of Three when he was subsequently hired by the police division, after commencement of this suit. This process was not a factor in Petitioner's being passed over in 1989.

Thereafter, a Notice of Appeal was filed, seeking review by the United States Court of Appeals for the Sixth Circuit. The parties appropriately briefed and argued the issues before that honorable court. On March 13, 1992 the Court of Appeals issued its opinion (Appendix 6A) in which it affirmed the decision of the lower court.

It is from the Sixth Circuit's decision that this Petition for a Writ of Certiorari is taken. Petitioner believes the Sixth Circuit's decision is in clear opposition to this honorable court's prior holdings and that the decision deprives petitioner of substantial rights under color of state law.

Petitioner asserts that he was unlawfully deprived of an opportunity for certification, review and hiring in the Cincinnati Police Division, due to a city instituted quota based on race and gender. The City contends that its quota was authorized by a Consent Decree entered in 1981, in the *United States of America v. City of Cincinnati* No. C-1-80-369 (S.D.Ohio, April 16, 1981) (Appendix 31A). The voluntary Consent Decree set forth that the City of Cincinnati would attempt to meet certain goals with regard to hiring and promoting black and female officers in the police division.

There was no finding that the City had discriminated against blacks nor any objective evidence to show any present effect of prior discrimination against blacks or females. The Consent Decree does not recite that any individuals were deprived of any rights, nor that the City's method of hiring and promoting, which is mandated by state law, was discriminatory. The decree also notes that the City denied discrimination.

The language which came closest to alleging past discrimination in employment practices was a general statement of purpose and intent which stated that the Consent Decree was:

> "to insure that blacks and women are not disadvantaged by the hiring, promotion, assignment and other employment policies and practices of the CPD (Cincinnati Police Division) and that any disadvantage to blacks and women which may have resulted in past discrimination is remedied . . . "

(Appendix 33A)

The only evidence offered by the City to show discrimination was an affidavit by an employment analyst, Vivian B. Toler (Appendix 28A). She performed a statistical analysis based on the percentages of blacks and females in the Police Division versus the percentages of such individuals in the general labor force, as well as in the pool of applicants for slots in the recruit class. Her analysis was based solely upon a Joint Stipulation (Appendix 21A) entered into between the parties to the Consent Decree.

The Joint Stipulation, which supplied the only data used in the analysis, focused solely upon the percentage of blacks and females in the entire labor force and applicant pool, rather than upon the percentage of *qualified* blacks and females in the labor force.

The City admitted that it hires police recruits to achieve recruit classes with predetermined percentages of blacks and females as long as there are sufficient numbers of minimally qualified individuals to fill those percentages. Instead of creating a single eligible list, in the order

of, excellence as shown by exam scores[2] as required by Ohio law, the City of Cincinnati created three separate eligible lists; one for blacks, one for females and one for white males. Then, according to the testimony of personnel analyst Carol Callahan and City Manager Johnson the recruit classes are selected from the lists so that 34% of the recruits are chosen from the "black list", 23% are chosen from the "female list" and the balance are chosen from the "white male list." The percentages are derived from the "interim goals" set forth in the consent decree.

The City, through its City Manager, admits that the Consent Decree did not set up a quota system. However, the City argues that the need to meet the goals in the Consent Decree gives it the right to create what is, in fact, a quota.

It is the constitutionality of an unwritten quota, created outside the Consent Decree, which petitioner asks be reviewed by this court. Petitioner believes that there is no evidence to support a quota and that, even if there were, the Consent Decree does not authorize one. Petitioner does not believe that the City has a right to create a quota simply for convenience.

ARGUMENT

I. REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

This case touches upon legal issues which are among the most controversial issues in our courts, as well as in

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[2] Certain other credits, such as veterans preference will alter the score, but never by more than a few points. These preferences apply to everyone equally.

our society as a whole. A decision by this court will have widespread and immediate effects upon many people, both "minorities" and "non-minorities." The sooner these issues are clarified, the sooner the extensive litigation and the anger, that inevitably and unfortunately is aroused on all sides, will diminish.

This Court's holdings in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1985); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of University of California v Bakke*, 438 U.S. 265 (1978) confirm that the Constitution of the United States protects everyone equally. "This Court has 'consistently repudiated [distinctions] between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Wygant* 476 U.S. at 273, *citing Loving v. Virginia*, 388 U.S. 1, 11 (1967). While recognizing that discrimination exists and must be eliminated from our society, "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." *Wygant* 476 U.S. at 273, *citing Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980). Under no circumstances has this court allowed resort to race-conscious relief merely to remedy or redress historic underrepresentation of minorities in any public endeavor, absent evidence of prior discrimination.

Unfortunately, several circuit courts, including the Sixth Circuit, while citing this court's pronouncements, have issued opinions which are clearly at odds with these prior Supreme Court decisions.[3] While the intention of

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[3] Examples of circuit court decisions which appear questionable under the precedents set forth by this court:

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these circuits in promoting the remedial purpose of these decrees may be benevolent, these lower court decisions fail to follow this court's legal precedent and doom innocent people to continued discrimination, merely because they are not members of a disadvantaged group.

This case presents the classic legal dilemma of whether a political subdivision, intent on helping those who have suffered historical discrimination, may impose upon an innocent individual the burden for correcting a perceived inequity, thereby causing an innocent person to be denied constitutionally protected rights.

The United States Court of Appeals for the Sixth Circuit, in its opinion, reviewed the present state of the law, but then significantly departed from this court's prior interpretations in its application. It is time for this court to speak to these issues in the employment context, particularly whether those who are being hired may be forced to carry a heavier burden for addressing societal discrimination than others.

This Court has previously addressed the issue of racial set-asides or quotas in various other contexts. In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 562 (1984) and *Wygant v. Jackson Board of Education*, 467 U.S. 257 (1985), the Supreme Court struck down racial preferences and set-asides in the context of layoffs of incumbent firefighters and public teachers respectively. In *Regents of University of California v. Bakke*, 438 U.S. 265

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Billish v City of Chicago, No. 90-1650, No. 90-2182, 1992 U.S. App. LEXIS 9292 (7th Cir., May 4, 1992).

See Donaghy v City of Omaha, 933 F.2d 1448 (8th Cir., 1991).

(1978), this Court ruled unconstitutional a public university's setting aside of certain slots in an entering medical school class for minority student applicants. Finally, in *City of Richmond v. J.A. Croson Co.*, 480 U.S. 469 (1989), this court struck down racial set-asides for minority-owned contractors seeking to do business with municipal entities.

The common thread running through all of these cases is the inherent reluctance of this Court to permit race-conscious remedies, classifications, set-asides or quotas to redress under-representation of minorities in public employment, academia, or commercial dealings with public entities. This concept was succinctly expressed by Mr. Justice Powell in *Bakke*:

> There is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making.

Bakke, 438 U.S. at 298. *Vogel* presents the ideal vehicle for extending the holdings of these cases to racial set-asides and quotas in the selection of *applicants* for public employment.

Underscoring the need for Supreme Court clarification of this particular area of public employment law is the tendency of some circuit's to regard *applicants* for public employment as somehow entitled to a lower level of constitutional protection than incumbent employees. *See e.g. Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991); *Billish v. City of Chicago*, No. 90-1650, No. 90-2182, 1992 U.S. App. LEXIS 9262 (7th Cir. May 4, 1992); *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990). Many of these courts cite dicta of this Court in *Wygant*, 467 U.S. at

283, to the effect that hiring quotas impose a lesser burden on non-minority applicants then race-based layoffs impose on incumbent employees.

On the other hand, numerous federal courts in other circuits have drawn *no* distinction between applicants and incumbents, and have accorded applicants the same constitutional guarantees to equal protection as did this court in *Bakke, Croson, Stotts* and *Wygant*, or at least have not regarded their status as recruits as a bar to assertion of their constitutional rights. *See e.g. Bertoncini v. City of Providence*, 767 F.Supp 1194 (D. R.I. 1991); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1411 (11th Cir. 1991). This Court has previously ruled that non-minority applicants adversely impacted by a pre-existing consent decree, possess important Fourteenth Amendment rights. *Local No. 93 International Association of Firefighters AFL-CIO v. City of Cleveland*, 478 U.S. 501 at 526 (1986).

Given the seeming confusion among various federal courts throughout the country on the issue of the constitutional rights of applicants, as opposed to incumbents, this Court should grant *certiorari* in the instant case to clarify the constitutional rights of non-minority applicants for public jobs.

Vogel is also appropriate for Supreme Court review because the Sixth Circuit employed an improper methodology to determine whether there existed statistical proof of discrimination to justify race-based relief.

All parties to this litigation agree that statistics may be utilized to determine whether a municipal entity has discriminated in its hiring or promotional practices. This Court has held, with regard to skilled positions, that one must compare the percentage of minorities in the at-issue work force, here the police recruit class, with a "qualified

labor pool." *See Hazelwood School District v. United States*, 433 U.S. 299 (1977). Comparing the racial composition of the at-issue work force with general city wide labor force statistics is clearly improper. *Hazelwood* at 433 U.S. at 308, N. 13.

However, this is exactly what the Sixth Circuit did in *Vogel*. Vogel quoted liberally from a pre-Consent Decree statistical study, relied upon by the City, comparing the percentage of blacks in the police division in 1980 with the blacks in the general city wide labor force. *Vogel v. City of Cincinnati*, 959 F.2d 594, 600 (6th Cir. 1992). *Vogel* also relied on additional statistics comparing the percentage of blacks and females in the recruit classes during the 1970s with the percentage of blacks and females in the pool of police recruit class *applicants*. *Vogel*, 959 F.2d at 600.

Even if the Sixth Circuit relied strictly on the statistical comparison between the percentage of pre-Consent Decree blacks and females in the 1980 recruit class with the percentage of black and female applicants for that class, such a statistical comparison would be constitutionally suspect. One's mere status as an applicant does not make him or her part of a qualified pool. Anyone can sit and take the police recruit entrance exam.

Vogel is not the only court to adopt comparisons with applicant pools. The Eighth Circuit in *Donaghy*, and the Seventh Circuit in *Billish* have undertaken a similar methodology. However, other federal courts throughout the country have refused to do so, insisting that in order to establish statistical discrimination by a public employer in its hiring and promotion policies, one must compare a percentage of minorities in the at-issue job category with a *qualified* labor pool. *Bertoncini v. City of Providence*, 767

F.Supp. 1194, 1202 (D.R.I. 1991); *Jaworski v. Cheney*, 771 F.Supp. 109, 112 (E.D.Pa. 1991).

These cases reflect an apparent confusion as to the proper procedure for determining whether there exists a statistical case of discrimination which would provide a predicate for race-conscious relief. This court has never endorsed a formula wherein a percentage of minorities in the at-issue job classification are compared with the percentage of minorities in the applicant pool. *Hazelwood* merely references a comparison with a pool of similarly situated *qualified* individuals. Further clarification from this Court is necessary to determine what sort of a statistical comparison is required to prove discrimination and hence a need for race-conscious relief, in the context of public employee recruitment. This case presents an ideal opportunity for this Court to provide such clarification.

II. QUESTION PRESENTED FOR REVIEW

1. When no hiring or promotional quota is authorized by a voluntary consent decree, entered into by a political subdivision, does the Fourteenth Amendment to the United States Constitution permit that political subdivision to create a quota, which imposes a societal burden on innocent individuals, in order to meet certain goals for hiring and promoting blacks and females.

a. Plaintiff, as a non-minority police recruit candidate, possesses standing to advance his own interpretation of the Consent Decree entered into between the City and the Intervenors.

In its decision below, the Sixth Circuit ruled that since a Consent Decree is likened to a private contract,

only the parties thereto may enforce it. The court reasoned that since the plaintiff herein was not a party to the decree, he had no standing to enforce and, by inference, interpret, the Decree. *Vogel*, 959 F.2d at 598 (*Citing Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975).

Blue Chips Stamps was, of course, handed down fourteen years prior to *Martin v. Wilks*, 490 U.S. 755 (1989) which addressed, for the first time, the predicament of non-minority individuals adversely impacted by a pre-existing Consent Decree to which they had never been made a party. The *Martin* court ruled broadly that such individuals had standing to challenge "employment decisions taken pursuant to consent decrees". *Martin* at 2181, Syll.

Martin drew no distinction between challenges to *interpretations*, as opposed to unconstitutional *effectuation*, of consent decrees. The language used by Chief Justice Rehnquist to empower non-minority individuals to protect their interests is sweeping:

> All agree that [i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* to a litigation in which he has not been designated a party or to which he has not been made a party by service of process . . . This rule is part of our deep-rooted historical tradition that everyone should have his own day in court . . . A judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings.

Martin, 490 U.S. at 761-62. (Citations and footnotes omitted).

To allow non-parties to a consent decree to litigate only the constitutional impact of a consent decree, without allowing them to argue the interpretation of the terms of the decree itself, would unduly hobble their efforts to vindicate their constitutional rights.

In the instant case Petitioner seeks to demonstrate that the race and sex-based hiring lists, utilized by the City, are unsupported by any reasonable interpretation of the Consent Decree. One method by which he could challenge the employment decisions taken pursuant to the consent decree, would be to demonstrate that the City's resort to these lists is outside the four corners of the Consent Decree. Under the Sixth Circuit's restrictive interpretation of standing, however, plaintiff and similarly situated non-parties to consent decrees in other reverse-discrimination cases throughout the country will be precluded from doing so.

b. The voluntary Consent Decree entered into by the City of Cincinnati in 1981 contained goals for hiring and promoting blacks and females in the police division, but did not authorize the City to use quotas to reach those goals.

In 1980 the United States of America filed a lawsuit against the City of Cincinnati, which culminated in a consent decree entered on August 13, 1981. The Consent Decree, which applies to both new recruits and certain promoted positions within the Cincinnati Police Division, sets goals with regard to hiring and promotion practices affecting black and female recruits and police officers. The Decree represents a settlement negotiated between and consented to by the City of Cincinnati and the United States.

The Decree states that the appropriate standard for determining whether black or female individuals were

disadvantaged was a comparison of the number of blacks and females in the police recruit class to the proportion of qualified blacks and females in the labor force of the City. On that basis, the City agreed to undertake a long term goal in which the number of blacks and females in all of the sworn ranks of the Cincinnati Police Division would approximate the percentage of qualified blacks and females in the labor force of the city. (Appendix 33A). The city also agreed that it would adopt, "as an interim measure, the goal of hiring qualified black and female officers in at least the percentages which they are represented on the 1980 police recruit list." (Appendix 33A-34A).

While the Decree speaks only of "interim" and "ultimate goals" the city chose to meet those goals through the use of quotas. During deposition testimony, the Cincinnati City Manager Scott Johnson, and Cincinnati's Supervising Personnel Analyst Carol Callahan, who is in charge of assuring compliance with the Consent Decree, both admitted that there is no quota in the Consent Decree.

c. A race or sex based quota, or set-aside, which operates to deprive innocent individuals of their rights, cannot be instituted absent "strict scrutiny" by a reviewing court as to whether such a set-aside is constitutionally justified.

The quotas imposed by the City of Cincinnati cannot survive strict scrutiny review. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980).

As has been established, the Consent Decree did not authorize a quota. The city chose to implement a quota on its own. A court is obligated to review an affirmative action plan's quota under the requirements of strict scrutiny. To do so, the court must engage in a two prong examination. "First, any racial classification 'must be justified by a compelling governmental interest.' *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (additional citations omitted). Second, the means chosen by the state to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Wygant* 476 U.S. at 274.

This court recently reaffirmed that "strict scrutiny" of affirmative action plans, which include racial classifications, was necessary. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson* the court stated:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" . . . Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Id. at 493.[4]

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[4] In its opinion, the Court of Appeals refers to the city's quota as part of "the plan," as if there were a written plan upon which the city relied and which instructed city officers how to proceed. In fact, there is no plan adopted by the city council, by the city manager or anyone else which included the "quota". How can any court perform its obligation to use strict scrutiny to review a classification plan, when no written plan exists? If a quota is to be used, it must be able to be reviewed, rather than exist as some unpublished policy. Otherwise, "strict scrutiny" is nothing more than a hollow shell.

(1) The "Affirmative Action Plan" adopted by the City, to the extent that it constituted a quota, was not supported by any evidence, actual or statistical, which established a compelling interest by the City in curing the present effects of past or present discrimination.

The city cannot meet the first prong of the two prong test set forth in *Fullilove* and *Wygant*, absent a compelling governmental interest. This prong must be met before going to the second prong, a narrowly tailored affirmative action plan. Without sufficient evidence of a compelling governmental interest in remedying the effects of past discrimination, there can be no race or gender-based classification system.

In *Bakke*, the desire to increase the number of minority medical students and doctors in a field where there is "a historic deficit of traditionally disfavored minorities" was not sufficient compelling governmental interest for medical student set-asides. *Bakke*, 438 U.S. at 306. Nor was the professed need to have minority teachers as role models for minority students satisfactory in *Wygant*. In *Croson*, the "generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy". *Croson*, 488 U.S. at 498.

In the instant case, there is no finding or admission of discrimination. The Consent Decree only indicates that there may have been a disadvantage to blacks and women "which may have resulted from past discrimination." (Appendix 33A). Beyond that, the Consent Decree states that it seeks to "ensure that blacks and women are not disadvantaged by hiring, promotion, assignment and

other employment policies and practices." (Appendix 33A). While both of these objectives are important and within the authority of the City of Cincinnati to assure, they do not show a compelling governmental interest sufficient to use racial and gender classifications which deprive others of their basic constitutional rights.

Absent an admission or finding of discrimination, statistics may be used to show discriminatory practices. The Court of Appeals quite correctly indicated that statistical disparities may justify an affirmative action policy up to and including quotas. However, the court incorrectly held that a quota was supported by the proper statistical comparison between the percentage of blacks and females within the Police Division and the percent of blacks and females in the general labor market or applicant pool.[5]

The court states that the affirmative action policy with respect to females is clearly justified. The "justification" is that there was an admission of discrimination against women by the City until 1974. As the evidence does support such a finding Petitioner agrees and does not argue that issue. However, there is no showing that, by 1981, when the Decree was enacted or by 1989, when petitioner was passed over for hiring, there remained any present effect of that past discrimination. In fact, neither

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[5] The statistical comparisons used to support the Consent Decree are proper if the Consent Decree does not authorize quotas. It is only when a Consent Decree is read as permitting the City of Cincinnati to use a quota that the statistical evidence falls short. Voluntary affirmative action programs, which use less intrusive and less suspect methods for providing affirmative action do not require the same statistical support.

in the District Court nor in the Court of Appeals did the City even attempt to connect past discrimination to any such present effects of such prior discrimination. Rather, Respondents relied solely upon statistical evidence to support their right to use a quota. However, the statistical evidence is flawed and therefore unusable as a predicate for a quota. The evidence was provided by a set of Joint Stipulations (Appendix 21A) and an affidavit of Vivian Toler (Appendix 28A), who was a statistical expert on behalf of the United States.[6] The inadequacy in the evidence originates with the Joint Stipulations, upon which the entire affidavit of Vivian Toler is based. Three specific stipulations are key, since all of the significant statistical analysis involves them. Those stipulations were:

> 7. According to the 1970 Census, the labor force of the City of Cincinnati is twenty-four point nine percent (24.9%) black and forty-two point six percent (42.6%) female
>
> . . .
>
> 16. Blacks composed approximately thirty-three point seven percent (33.7%) of the applicants for entry level police officer positions for the two selection processes resulting in eligibility lists from which entry level officers were appointed between 1972 and 1979
>
> . . .
>
> 19. The female applicant rate for the selection process which resulted in the establishment of the September, 1974 entry level eligibility list

[6] Vivian Toler was a statistical expert supplied in the original action by plaintiff United States of America on behalf of the Justice Department, not a city statistical expert as set forth by the Sixth Circuit opinion.

> from which entry level officers were appointed from 1974 until establishment of the 1980 entry level eligibility list, was approximately twenty-two point eight percent (22.8%).

All of the significant statistical comparisons made by Vivian Toler use the data in one of the above three paragraphs. Yet, none of the Joint Stipulations discuss the percentage of *qualified* blacks and women in the work force.

The uncontroverted evidence is that only ten percent (10%) of those who sign up to become police recruits actually survive the testing to be placed on the police recruit list. If ninety percent (90%) of those who sign up ultimately do not to qualify for the position, it is clear that there are stringent and substantial qualifications attached to becoming a police officer in the City of Cincinnati. Yet, none of the statistical evidence compares the expected numbers of females and minorities to those "qualified" females and minorities in the work force.

It is clear from *Croson* that it is necessary to make a comparison to the qualified work force, even in a hiring situation, if the position at issue requires qualified personnel. *Croson*, 488 U.S. at 501-02. As this Court stated:

> In the employment context, we have recognized that for certain entry level positions . . . statistical comparisons of the racial composition of an employers work force to the racial composition of the relevant population may be probative of a pattern of discrimination (citation omitted). But where special qualifications are necessary, the relevant statistical proof for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

Id. at 501-02.

A central issue in *Croson* is that the City of Richmond had no idea how many Minority Business Enterprises ("MBE's") in the relevant market were qualified to undertake work on public projects. Likewise, the City of Cincinnati has no idea what the qualified population of blacks and females was or is, never having sought that information.

Respondent City cannot argue that it was unaware of the necessity for a comparison to the qualified blacks and females in the labor force. The Consent Decree itself states that "the city defendants have agreed that in determining whether this purpose has been achieved, an appropriate standard of comparison is the proportion of qualified blacks and women in the labor force of the City of Cincinnati." (Appendix 33A). While the Consent Decree requires the comparison of the number of blacks and women in the police recruit classes to the qualified population in the labor force, none of the evidence, upon which the Consent Decree and ultimately the Sixth Circuit's decision is based, undertook such a comparison. Given that 90% of the potential recruits do not qualify, the statistical evidence regarding the expected numbers of blacks and females might appear very different if only those in qualified work force are factored into the equation.

If the city had admitted there were present effects of past discrimination and had evidence necessary to support that admission, then the statistical comparison may not have been needed. However, that is not this case here. There must be sufficient evidence to justify the conclusion that there has been prior discrimination. *Wygant*, 476 U.S. 274; *Croson*, 488 U.S. at 498. "Evidentiary support for the conclusion that remedial action is warranted becomes

crucial when the remedial program is challenged in court by non-minority employees". *Wygant*, 476 U.S. at 277. That evidentiary support is lacking here.

The interim goal of the Consent Decree was taken from the number of qualified minority and female recruits in the 1980 recruit class. If these numbers are as definitive and appropriate as the Sixth Circuit indicates, why does the city feel compelled to impose a quota, a goal or any other plan? Clearly, in 1980, the city must have felt the percentages of blacks, whites and females was acceptable. Thus, not only is evidence of discrimination lacking but there could be no inference of any present effects of past discrimination.

There is no doubt, nor do petitioners argue, that in the appropriate circumstances a quota may be required. Ongoing intransigent discrimination by a public entity will sometimes require such quotas. However, the very fact that the 1980 recruit class had satisfactory representation of blacks and women would itself remove any compelling governmental interest in creating and maintaining race and gender-oriented quota to protect blacks and women.

The attempt by the Sixth Circuit to compare the racial and gender composition of the police force to the applicant pool from which it is selected has no basis in law. There were no statistical experts to indicate such a test would be statistically valid. On its face, such a test would be invalid, as there is absolutely no control over who becomes a member of the applicant pool. Anyone who signs up to become a police recruit candidate, would become a member of the applicant pool, irrespective of

his or her qualifications. Therefore, such bootstrap reasoning cannot provide the statistical evidence upon which to base racial and gender classifications.

Clearly, there is no demonstration of compelling governmental interest sufficient to deprive petitioner of his constitutional and Ohio statutory rights.

(2) The quota created by the city was not narrowly tailored, since it was based upon an interim goal bearing no relationship to any reasonable criteria and an ultimate goal which was and is indeterminate both as to termination date and the nature of the ultimate goal to be achieved.

The interim goals for selecting police recruits were arbitrarily determined from the percentage of blacks and females sworn in to the 1980 recruit class, the last class before the Consent Decree went into effect. The interim goal for recruits in the Decree was set as thirty-four percent (34%) blacks and twenty-three percent (23%) females in each recruit class. The city must have been doing a satisfactory job of hiring blacks and females in 1980, since the parties agreed to use these existing recruit class percentages as the "goals" in the Decree. If the City were acting in a discriminatory manner in its hiring practices, the 1980 percentages would not have formed a valid basis for determining the appropriate interim goal for the Consent Decree. As in *Croson* where "The 30% quota" could not "be tied to any injury suffered by anyone," *Croson*, 488 U.S. at 499) the percentage of blacks and females sworn into the 1980 recruit class is completely unrelated to any prior discrimination. Therefore, resort to hiring set-asides in this matter can hardly be considered "narrowly tailored."

Additionally, the ultimate goal of the Consent Decree is indeterminate. Thus it is not narrowly tailored, as there is no way of knowing whether the ultimate goal of the Decree has ever been met. The Decree states the ultimate goal as follows:

> The city defendants have agreed that in determining whether this purpose has been achieved, an appropriate standard of comparison is the proportion of qualified blacks and women in the labor force of the City of Cincinnati and the city defendants have agreed to undertake as the long term goal of this Decree, subject to the availability of qualified applicants, approximating that proportion of blacks and women in all of the sworn ranks of the CPD.

(Appendix 33A). Not only do the goals of the Decree call for a straight balancing of minorities, females and non-minority males, which is in itself a dubious practice, it never states at what point that "balance" exists.

Nowhere in the Decree is there a time table set for meeting the goals. From the language of the Decree, it cannot be determined whether or not the proportion of blacks and women in the Cincinnati Police Division are to approximate the qualified work force of the city on the date the suit was filed, on the date the Decree was entered or on some other indeterminate and indeterminable future date, when the proportion of blacks and females in the police division approximate the proportion of blacks and females in the qualified work force. In short, there is no termination date for the Consent Decree, nor any meaningful ultimate goal by which to determine when it should be terminated.

As to terminating the Decree, it simply states that:

> At any time after five years from the date of this Decree, the city defendants may notify plaintiff with sixty days notice, of their desire to terminate this Decree; and upon showing achievement of the goals of this Decree, it shall be terminated . . . (Appendix 43A).

Of those in charge of overseeing the City's compliance with the Decree, neither the city manager nor the senior personnel analyst, could say when or how the Decree terminated. In their testimony, both of them stated that they would have to consult with the law department in order to make such a determination.

It is clear that this Decree could potentially never terminate, unless the defendant City determines that it wishes to apply for termination. This voluntary termination of the Consent Decree makes the Decree both indeterminate and a political rather than legal matter, a circumstance much feared by the *Croson* court. Such method of termination allows the City "to engage in discriminatory hiring . . . practices long past the point required by any legitimate remedial purpose." *Wygant*, 476 U.S. at 275. This termination provision will encourage exactly the type of "racial politics", of which we were warned in *Croson*, 488 U.S. at 493.

With no meaningful interim goal and no certain ultimate goal, the Consent Decree, to the extent that it is read as permitting a quota, has *not* been narrowly tailored. On that basis, Petitioner has been unjustly deprived of his rights, based upon the Decree which is overbroad. Clearly, the Consent Decree in question is not narrowly tailored by any interpretation that this court has given to the meaning of the term.

d. The opinion of the Sixth Circuit was not supported by the authorities upon which it relied.

While the Sixth Circuit recognized that *Croson*, and *Hazelwood School District* require a statistical comparison between race and gender of the police recruit class and the race and gender of the qualified labor market, the court improperly applied this comparison.

The Sixth Circuit attempts to bootstrap evidence where there is none, in order to create a valid comparison. After finding discrimination based on a comparison between the percentage of blacks and women in the recruit class and the applicant pool, and similar comparisons between blacks and women in the general work force it then compares the composition of police force *in general* with the percent of blacks and whites who passed the exam in 1980! Further, even if all applicants who passed the exam were deemed qualified, that does not mean they were equally qualified. A passing score seems of 60 does not represent the same degree of qualification as a score of 90. (See *Bertoncini*, 767 F.Supp. at 1202). The court then went on to say:

> Moreover, the city considered the fact that in 1980, following substantial efforts to increase the numbers of blacks and women on the police force, *qualified* blacks and women constituted, respectively, thirty-four percent (34%) and twenty-three percent (23%) of the class of recruits. The city thus "linked-up" the low percentages of blacks and women on its police force with the eligible pool of applicants.

The random percentage of blacks and females, who were hired in the 1980 recruit class somehow became the central goal for determining the appropriate number of

qualified minorities and females to be used in the Consent Decree. Never has this court, in *Croson*, *Hazelwood* or in any other case, approved of such a procedure. Certainly, if this is an adequate test, the complicated "binomial approximation model" is unnecessary.

The use of such a test would cause great harm. The random number of individuals who happened to pass a particular recruit exam is *not* a valid indication of the percentage of qualified blacks and females in the work force. Further, there was certainly no testimony or evidence to support such a theory. The use of such evidence could become a weapon to those who wish to perpetuate discriminatory activity. If such tests are self defining, a very low grade on a test by minorities or women, could be used to effectively indicate that only that very low percentage are qualified for the job.

In upholding the city's unwritten nonexistent quota "Plan," the Sixth Circuit avoided the constitutional questions raised by Petitioner. The Court merely stated that "although initial employment opportunities coupled with hiring goals may burden some innocent individuals, they do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security and seniority involved." *Vogel v. City Of Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992). Thus, the Court of Appeals essentially found that since there are no layoffs or loss of seniority, those who are being hired have little or no protectable rights.

This court has held in Title VII cases, that some intrusion and burden may be born by innocent entry level individuals, with no expectancy of employment, in the appropriate case. *Wygant*, 476 U.S. at 277. However, this court has never gone as far as the Court of Appeals. The

Circuit Court's opinion provides those in hiring situations, individuals have less protectable Fourteenth Amendment rights than those already employed. However, the entire basis for this court's decisions in *Croson* and *Bakke* was that the constitution applied equally to all. This is not a Title VII case. The Court of Appeals should not use a Title VII standard for a case involving Constitutional deprivation.

The Court of Appeals further indicated that the "plan" adopted by the city does not present a complete bar to non-minorities. In this, the lower court cites *Vanguards*, 753 F.2d at 484. *Vanguards*, however, contains no discussion of the issue. Furthermore, the reliance is misplaced. The City has created an absolute bar to white males for up to fifty-seven percent of each recruit class (23% plus 34%), which the city determines must be filled by black males and by females.[7]

The Sixth Circuit ignored the teaching of *Regents of University of California v. Bakke*, 438 U.S. 265, 305 (1978) in which this court made it clear that being foreclosed from certain positions set aside for one group or another constitutes a "line drawn on the basis of race". *Bakke* at 289. In the *Bakke* case this Court found that setting aside sixteen spaces out of one hundred for minorities required heightened judicial scrutiny as the justification for such a set-aside.

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[7] The 57% reserved for minorities and females wiil be reduced by the number of females who are also black. A black female may be used to meet the goals set for both "blacks" and "females" under the Decree.

CONCLUSION

For all of the reasons set forth, Petitioner respectfully as that the within Petition For Writ Of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

WILLIAM S. WYLER
DONALD B. HORDES
DONNA M. BERGMANN

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

RICHARD VOGEL, ET AL.	JUDGMENT IN A CIVIL CASE
v.	
CITY OF CINCINNATI	
and	CASE-NUMBER C-1-89-683
SENTINEL POLICE ASSOCIATION	

_ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUGED that Plaintiff's motion for summary judgment is DENIED; Defendants motion for summary judgment is GRANTED; Case is DISMISSED at plaintiff's costs.

April 16, 1991
Date

KENNETH J. MURPHY
Clerk

/s/ Paul Hemmings
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD VOGEL, ET AL.,

Plaintiffs,

v.

CITY OF CINCINNATI,

Defendant,

and

SENTINEL POLICE ASSOCIATION,

Defendant-Intervenors,

Civil
No.
C-1-89-0683

ORDER

This matter is before the Court on cross-motions for summary judgment and upon agreement of counsel that disposition of such motions would be dispositive of the liability issue in this matter. Plaintiffs question the validity of a consent decree heretofore entered in *United States of America v. Cincinnati, Ohio,* Civil No. C-1-80-369 (hereinafter referred as "Consent Decree.") This decree was entered into on August 13, 1981, and provided for an increased hiring by the Cincinnati Police Division of both blacks and women. In accordance with Rule 52, Fed. R. Civ. P., the Court does hereby set forth its Findings of Fact, Opinion and Conclusions of Law.

I.

FINDINGS OF FACT

1. Plaintiffs were police recruit candidates who were placed upon an open eligible list posted September 12, 1989. Such list was prepared for the hiring of police recruits by the Cincinnati Police Division.

2. The successful examination candidates who are eligible for certification to Police Chief are divided into three lists: One of majority white males; a second list of females; and a third list for male and female blacks. Plaintiffs are all white males.

3. Plaintiff [sic] were not selected as members of the recruit class that was sworn in in October, 1989. It is agreed by the parties that their respective rank order on an open eligible list would qualify each plaintiff for certification to the Police Chief for review under the "Rule of Three[1]."

4. The Consent Decree was intended to increase the number of females and blacks hired by the Police Division. In paragraph 2 it sets forth the "goal of hiring qualified black and female officers in at least the percentages which they are represented on the 1980 Police

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[1] Ohio Revised Code § 124.27 requires the Civil Service Commission to "certify to the appointing authority the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which the position belongs; . . . the appointing authority shall . . . fill such position by appointing one of the three persons certified to him. . . .

Recruit List." Such paragraph also identifies the percentages at 34% black and 23% female. This is intended to be an "interim measure."

II.

OPINION

This Court has had occasion recently to consider the legal effect of another Consent Decree. That Decree established a specific percentage for hiring of minority and female employees in the Cincinnati Fire Division. The percentages referred to had been reached. *Jansen v. City of Cincinnati,* C-1-89-079. That opinion is not applicable herein. In this matter the Court must consider a Consent Decree wherein the specific percentages have not been met. The obligation imposed upon the City in the Consent Decree is a hiring level of 34% black and 23% female. Neither level has been achieved. It has been held in this Circuit that a District Court has discretion to modify a Consent Decree, *Brown v. Neeb,* 644 F.2d 551 (6th Cir. 1981). This Court declines to exercise such discretion. It is equally clear that the City of Cincinnati has the right to enter into a Consent Decree and the parties who are benefitted are entitled to the terms thereof. *Brown v. Neeb, supra* at 557. There is some authority for the proposition that a Consent Decree may take precedence over civil service law if there is a conflict between them. *Brown v. Neeb, supra* at 563-64.

In view of the foregoing, the lack of achievement of the goals of the Consent Decree require the Plaintiffs' Motion for Summary Judgment be DENIED and that Defendant's Motion for Summary Judgment be granted.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction pursuant to 42 U.S.C. § 1983.

B. A municipal corporation may enter into a valid Consent Decree.

C. A Consent Decree which sets forth specific percentages of employment for blacks and women requires the parties to follow the terms thereof until the specific percentages are achieved even though the means used to do so would violate the Civil Service Laws of Ohio.

D. In accordance with the foregoing, the Motion for Summary Judgment of Plaintiff is hereby DENIED; the Motion for Summary Judgment of Defendant is hereby GRANTED.

This case is hereby dismissed at Plaintiff's costs.

IT IS SO ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin
United States
District Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-3474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD VOGEL, *Appellant,* v. The City Of Cincinnati, et al., *Appellees,* The Sentinel Police Association, *Intervenor-Appellee.*	)	On Appeal from the United States District Court for the Southern District of Ohio

Decided and Filed March 13, 1992

Before: KEITH, RYAN AND TIMBERS,* Circuit Judges.

TIMBERS, Circuit Judge, delivered the opinion of the court in which KEITH, Circuit Judge, joined. RYAN, Circuit Judge (p. 13 [20A]), delivered a separate opinion concurring in part and dissenting in part.

* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

TIMBERS, Circuit Judge. Appellant Richard Vogel appeals from a summary judgment entered April 16, 1991, in the Southern District of Ohio, Carl B. Rubin, *District Judge*, in favor of appellees City of Cincinnati, et al., in an action commenced by Vogel to obtain damages resulting from the Cincinnati Police Division's affirmative action hiring policy.

The City adopted the affirmative hiring policy pursuant to a consent decree entered August 13, 1981. This settled an action commenced by the Department of Justice charging the City with engaging in hiring and promoting practices that discriminated against blacks and women.

On appeal, Vogel, a white male, contends that the City has gone beyond the scope of the consent decree in administering its affirmative action policy; or, in the alternative, that the City's affirmative action policy violates the equal protection clause of the Fourteenth Amendment.

We affirm.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

In 1980 the Department of Justice, on behalf of the United States, commenced an action against the City of Cincinnati, the Cincinnati Police Division and the Cincinnati Civil Service Commission (collectively, the City) alleging that they had engaged in hiring and promoting

practices that discriminated against blacks and women in violation of Title VII. The Fraternal Order of Police, the collective bargaining representative of the police officers of Cincinnati, intervened in the action. After extensive negotiations between all parties, a consent decree was entered August 13, 1981.

The consent decree provided that its purpose was to remedy any disadvantage to blacks and women that may have resulted from past discrimination so that equal employment opportunity would be provided for all. It established a long term goal of having the proportion of blacks and women in the sworn ranks of the Cincinnati Police Division approximate the proportion of qualified blacks and women in Cincinnati's work force. In order to reach that goal, the decree adopted as an interim goal the hiring of qualified black and female officers in at least the percentages that they represented in the 1980 recruit class (34% blacks, 23% women). These percentages resulted from the City's recent efforts to recruit more blacks and women for its police force. The consent decree specifically provided, however, that:

> "nothing herein contained shall be interpreted as requiring the City defendants to hire unnecessary personnel, or to hire, transfer or promote a person who is less qualified over a person who is more qualified on the basis of properly validated employment selection devices within the meaning of the [Uniform Guidelines]."

Moreover, the decree provided that it would terminate upon a showing that its long term goal had been achieved.

In order to implement the decree, the City adopted a new procedure for hiring police recruits. Candidates initially are subjected to a medical examination, a psychological evaluation, a physical ability test, and a background investigation. Candidates then are given a written examination which has been validated to determine minimum qualifications for police recruits. Those candidates achieving a score of at least 60% on the examination are placed on the Open Eligible List. When selecting from the Open Eligible List, the City accords preference to qualified blacks and women as necessary to meet, if possible, the interim goal established by the consent decree of having recruit classes that are 34% black and 23% women.

As a result of this affirmative action policy administered by the Cincinnati Police Department pursuant to the consent decree, Vogel was not selected as a member of the recruit class that began training in October 1989. Although he was appointed to a recruit class within several months thereafter, he commenced this action against the City seeking back pay, retroactive seniority and other benefits for the period that he was denied a position with the police force due to the hiring policy of the City.

In support of his claim Vogel contends that the City has gone beyond the terms of the consent decree by implementing what is essentially a quota system, i.e. taking a predetermined percentage of blacks and women into each recruit class. Specifically, he contends that the City's policy is not in accord with that part of the decree which provides that "nothing herein shall be interpreted as requiring the City to hire unnecessary personnel . . . or

a person less qualified over a person who is more qualified on the basis of properly validated employment selection devices. . . . " Vogel contends that, since the City's policy resulted in the City hiring candidates with lower written examination scores than his, the City violated the consent decree. In the alternative, Vogel contends that, if in fact the Police Department's hiring policy is authorized by the consent decree, then the consent decree violates the equal protection clause of the Fourteenth Amendment.

Oral argument in the instant case took place in our Court on November 5, 1991. On November 21, the Civil Rights Act of 1991 (1991 Act or the Act) was enacted. As a preliminary matter, therefore, we must address whether the 1991 Act is to be applied retroactively to the instant case. We hold that the 1991 Act does not govern the instant case which involves conduct that occurred before the 1991 Act became law. We therefore shall not attempt to interpret the substantive provisions of the 1991 Act; rather, we shall apply the law that was in effect prior to the 1991 Act.

We hold that Vogel, who was not a party to the consent decree, lacks standing to challenge the City's interpretation of the decree. Moreover, we hold that, although Vogel does have standing to challenge the constitutionality of the City's policy pursuant to the decree, the affirmative action policy adopted by the City pursuant to the consent decree does not violate the equal protection clause of the Fourteenth Amendment.

We affirm the summary judgment of the district court dismissing Vogel's claim against the City.

II.

The Supreme Court has not yet settled the question of whether, absent clear legislative intent, a congressional enactment should be applied retroactively or prospectively. In *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), the Court articulated the proposition that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. In its more recent decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), however, the Court reiterated the longstanding principle that "[r]etroactively is not favored in the law. . . . [and] congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 327 (1990), the Court recognized this "apparent tension" in its precedents, *id.* at 837, but it did not settle the issue since in *Kaiser* there was clear evidence of congressional intent; and "where congressional intent is clear, it governs." *Id.*

The 1991 Act, on its face, does not make clear whether it should be applied retroactively or prospectively. Section 402 of the Act states that "[e]xcept as otherwise specifically provided, this Act and the Amendments made by this Act shall take effect upon enactment." This language could be construed to mean either that the Act should be applied to any charge or case pending on or after the date of enactment, or that it should be applied only to conduct occurring after that

date. The legislative history does not provide any guidance on this question. Senators expressed conflicting views. For example, Senator Danforth stated that the Act was to apply prospectively only, 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991), whereas Senator Kennedy expressed disagreement with that view. *Id.*

District courts construing the Act have split on the issue of whether it should be applied retroactively or prospectively. *Compare Van Meter v. Barr*, 1991 WL 277381 (D.D.C. Dec. 20, 1991) (refusing to apply damages provision of the 1991 Civil Rights Act retroactively) *with Mojica v. Gannett Co.*, 1991 WL 270602 (N.D. Ill. Nov. 27, 1991) (applying the Act retroactively to allow recovery of damages pursuant to the Act).

In response to the uncertainty generated by the failure of Congress to specify whether the Act should be applied retroactively or prospectively, the Equal Employment Opportunity Commission, on December 27, 1991 issued a policy statement that it "will not seek damages under the Civil Rights Act of 1991 for events occurring before November 21, 1991." Generally, absent clear legislative intent, the construction given a statute by the agency that administers it is entitled to deference, provided it is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). In light of the ambiguity of the statute on its face and the lack of congressional guidance, the EEOC's decision to apply the 1991 Act prospectively appears reasonable.

This is consistent with out recent decision in *United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991), where we had to decide whether, absent clear legislative intent, a

provision of the False Claims Act should apply retroactively or prospectively. We stated that the choice was "between the broad statement of the law in *Bradley* and the recent affirmation in *Bowen* of the general rule against retrospective application." *Id.* at 1037. While recognizing that we frequently have cited *Bradley* as controlling, we nevertheless held that *Bradley* should be read narrowly and should not be applied in contexts where "substantive rights and liabilities", broadly construed, would be affected. *Id.* at 1037-38. Clearly, retroactive application of the 1991 Act would affect "substantive rights and liabilities" of the parties to this action.

We hold that the 1991 Act does not apply retroactively to Vogel's claim for damages resulting from the hiring policy the City's police department adopted pursuant to the consent decree. We therefore apply the law that was in effect prior to the enactment of the 1991 Act.

III.

(A)

A consent decree, although in effect a final judgment, is a contract founded on the agreement of the parties. *Long v. City of Saginaw*, 911 F.2d 1192, 1201 n.5 (6th Cir. 1990); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir. 1985); *Williams v. Vokovich*, 720 F.2d 909, 920 (6th Cir. 1983). It should be construed to preserve the position for which the parties bargained. *Williams, supra*, 720 F.2d at 920. A consent decree "is not enforceable directly or in collateral proceedings by those who are not parties to it. . . . " *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). It "may be challenged only on

the ground that its substantive provisions unlawfully infringe upon the rights of the complainant." *Vanguards of Cleveland, supra,* 753 F.2d at 484.

In contending that the City has gone beyond the scope of the consent decree in administering its affirmative hiring policy, Vogel, who was not a party to the consent decree, seeks collaterally to enforce it according to his own interpretation of it.

We hold that Vogel lacks standing to assert such a claim.

(B)

Vogel, however, also contends that the City's affirmative action policy pursuant to the decree violates the equal protection clause of the Fourteenth Amendment. In this respect, the initial hurdle for Vogel is the standing requirement of Article III. "To have standing, a party must be aggrieved by the judicial action from which it appeals." *Vanguards of Cleveland, supra,* 753 F.2d at 484. Regardless of how moderate a preference the decree accords women and minorities, if there is some detriment to the party challenging the decree, that party has sufficient standing to challenge the decree. *Id.* Moreover, in the recent case of *Martin v. Wilks,* 490 U.S. 755 (1989), the Court adhered to the general rule that a party cannot be deprived of rights at a proceeding to which he is not a party. *Id.* at 762. The Court held in *Martin* that people who are not made a party to a consent decree have standing to commence an action challenging the constitutionality of the decree as it is applied to them.

Since Vogel was denied employment with the Cincinnati Police Department for a period of several months as a result of the affirmative action policy adopted by the City pursuant to the consent decree, and since Vogel was not a party to the consent decree, we hold that he has standing to challenge the constitutionality of the decree as it is applied to him.

IV.

We traditionally have reviewed affirmative action plans to determine whether they are reasonably related to the objective of remedying prior discrimination and whether the plans are fair and reasonable to non-minorities who may be affected by them. *Vanguards, supra,* 753 F.2d at 484.

Here, the plan adopted by the City pursuant to the consent decree does not require the discharge of non-minority workers and "although initial employment opportunities coupled with hiring goals may burden some innocent individuals, they do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security, and seniority, involve." *Long, supra,* 911 F.2d at 1196-97 (citing *Wygant v. Jackson Board of Ed.,* 476 U.S. 267, 283 (1986)). Neither does the plan adopted by the City present a complete bar to non-minorities. *Vanguards, Supra,* 753 F.2d at 484. Moreover, the plan requires the hiring only of *qualified* blacks and women; it does not require the selection of unqualified blacks or women over qualified white males. The hiring policy the

Cincinnati Police Division adopted pursuant to the consent decree therefore is a fair and reasonable policy of affirmative action.

The Supreme Court, however, has begun subjecting race-conscious affirmative action plans to strict scrutiny. Any racial classification must be justified by a compelling state interest, *Wygant, supra*, 476 U.S. at 274 (plurality opinion); *Palmore v. Sidoti*, 469 U.S. 429, 432 (1984), and the means chosen by the state must be narrowly tailored to achieve that goal. *Wygant, supra*, 476 U.S. at 274; *Fullivove v. Klutznick*, 448 U.S. 448, 480 (1980) (plurality opinion). The level of scrutiny does not change merely because the challenged classification works against a group that historically has not been subject to governmental discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion); *Wygant, supra*, 476 U.S. at 273; *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982).

For the City's affirmative action policy to pass muster pursuant to this strict scrutiny standard, the City must have " 'a strong basis in evidence for its conclusion that remedial action was necessary.' " *Long, supra*, 911 F.2d at 1196 (quoting *Wygant, supra*, 476 U.S. at 277). "[A]n amorphous claim that there has been past discrimination in a particular industry . . . " does not suffice. *Croson, supra*, 488 U.S. at 499. Evidence of wide statistical disparities, however, may justify an affirmative action policy adopted by a public employer. *Wygant, supra*, 476 U.S. at 274-75 (citing Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977)). Here, the proper statistical comparison is between the race and gender of the Cincinnati Police Division and race and gender of the relevant qualified labor market. *Croson, supra*, 488 U.S. at 501-02;

Wygant, supra, 476 U.S. at 275; *Hazelwood, supra*, 433 U.S. at 308.

In the instant case, the City's affirmative action policy with respect to women is clearly justified. In the past the City had limited women to ten positions with the CPD; required more education of female than male applicants for entry level positions with the CPD; prevented women from achieving a rank above that of police specialists; and assigned women exclusively to the juvenile division of the CPD. As of July 1980, only 3.4% of the sworn force of the Cincinnati Police Department were women while women constituted 22.8% of the applicants for the applicants for the force during the period from 1974 to February 1980.

With respect to black's, the City's affirmative action hiring policy is justified, in part, by statistics which show that, between 1972 and 1979, 33.7% of the applicants for entry level police officer positions were black, whereas only 20.4% of the appointments were black. Moreover, in 1980 only 9.9% of the sworn officers in the Police Department were black while the labor force of the City was 24% black. The City's statistical expert, Vivian Toler, analyzed these statistics according to the binomial approximation model adopted by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) and *Hazelwood, supra*, 433 U.S. at 308-09 n.14. Under this model, which involves a "calculation of the 'standard deviation' as a measure of predicted fluctuations from the expected value of a sample . . . [a] 'difference between the expected value and the observed number [that] is greater than two or three standard deviations,'" would allow an inference that race had played a role in the City's hiring policies.

Hazelwood, supra, 433 U.S. at 309 n.14 (quoting *Castaneda, supra,* 430 U.S. at 497 n.17). Here, the disparity between the expected rate of black appointments and the actual rate was 4.7 standard deviations. The disparity between the expected and actual numbers of blacks on the Cincinnati police force was 12.5 standard deviations.

Vogel points to no statistics that would case doubt on the validity of the statistics relied upon by the City. Instead, relying on *Croson, supra,* 488 U.S. 469, he contends only that the City's statistics are not relevant because they fail adequately to consider the percentages of *qualified* women and minorities. Indeed, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 501-02 (citing *Hazelwood, supra,* 433 U.S. at 308). As the Court stated in *Croson,* "[f]or low minority membership . . . to be relevant, the city would have to link it up to the number of local [minority businesses] eligible for membership." *Id.* at 503.

Unlike *Croson,* where the City of Richmond had adopted an affirmative action plan based on a finding of discrimination in the construction industry in general, Cincinnati's plan was based on statistics indicating that it had discriminated in hiring its own police force. *Accord Cone Corp. v. Hillsborough County,* 908 F.2d 908, 915 (11th Cir. 1990). Moreover, the City did not rely on statistical comparisons with the general work force of the City of Cincinnati. Rather, the City compared the composition of its police force with the applicant pool from which it was selected. *Cf. Long v. City of Saginaw, supra,* 911 F.2d at 1202 ("[I]t is only when the statistics disclose the availability of

minorities in the relevant labor pool substantially exceeded those hired that an inference of deliberate discrimination in employment may be drawn." (emphasis added)). Moreover, the City considered the fact that in 1980, following substantial efforts to increase the numbers of blacks and women on the police force, *qualified* blacks and women constituted, respectively, 34% and 23% of the class of recruits. The City thus "linked up" the low percentages of blacks and women on its police force with the eligible pool of applicants.

We hold that the City had "a strong basis in evidence for its conclusion that remedial action was necessary," *Wygant, supra*, 476 U.S. at 277, and was justified in adopting the affirmative action hiring policy for its police force.

V.

To summarize:

Vogel, who was not a party to the consent decree, lacked standing to challenge collaterally the City's interpretation of the decree. He had standing, however, to challenge the constitutionality, as applied to him, of the policy the City adopted pursuant to the consent decree.

We hold that the hiring policy adopted by the City pursuant to the consent decree does not violate the equal protection clause of the Fourteenth Amendment. It serves to eradicate the present effects of the City's prior discriminatory hiring practices, and it is narrowly tailored to achieve that purpose.

Affirmed.

RYAN, Circuit Judge, concurring in part and dissenting in part. I concur in the court's conclusion that Richard Vogel is without standing to contest the validity of the 1981 consent judgment and has suffered no deprivation of any right under the Fourteenth Amendment of the United States Constitution as a result of Cincinnati's affirmative action hiring policy. I also concur, therefore, in the court's judgment of affirmance.

I decline, however, to join the court's holding that the Civil Rights Act of 1991, 42 U.S.C. § 1981, "does not apply retroactively to Vogel's claim for damages resulting from the hiring policy the City's Police Division adopted pursuant to the consent decree." The basis for the court's ruling does not rest upon any consideration peculiar to Vogel's claim, but rather upon a more universally applicable analysis of the statute's retroactivity under general principles of statutory construction.

It may be that the court is correct in its conclusion that the Act is not retroactively applicable to Vogel's claims, but the issue of the retroactivity of the Act in general, or, if retroactive, its applicability to this case in particular, has not been raised, briefed, or fully argued by the parties.

I would not pass upon that very significant question without full briefing and proper submission of the issue.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	:	CIVIL ACTION NO. C-1-80-369
v.	:	
CITY OF CINCINNATI, OHIO, et al.,	:	
Defendants.	:	

JOINT STIPULATIONS BETWEEN THE
UNITED STATES AND THE CITY OF CINCINNATI
(Filed June 25, 1981)

The United States and the City of Cincinnati agree to the following stipulations for purposes of this action only:

1. The Court has jurisdiction of this action under 42 U.S.C. Section 2000e-6(b); 42 U.S.C. Section 3789(c)(3); 31 U.S.C. Section 1242(g); and 28 U.S.C. Section 1345.

2. The Defendant City of Cincinnati is an employer within the meaning of 42 U.S.C. Section 2000e-(b) and a unit of local government within the meaning of 42 U.S.C. Section 3789(c)(3) and 31 U.S.C. Section 1242(g).

3. The Defendant City of Cincinnati has received and is receiving funds pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. Section 3789 *et seq.*; and the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. Section 1242 *et seq.*, which are used for the operation of the Cincinnati Police Division.

4. The City of Cincinnati operates and maintains the Cincinnati Police Division (hereinafter CPD).

5. Defendants Hull, Sheehan and Guggenheim are responsible for preparing police entry and promotional examinations, establishing lists of candidates eligible for appointment and promotion, and certifying candidates to the CPD for appointment to the sworn ranks of the CPD.

6. The CPD is responsible for selection procedures other than written examinations which are used to determine a candidate's eligibility for appointment or promotion to the sworn ranks of the CPD.

7. According to the 1970 Census, the labor force of the City of Cincinnati is 24.9 percent black and 42.6 percent female.

8. As of September 1979, when the United States initiated its investigation of the employment practices of the CPD, the sworn force of the CPD consisted of approximately 951 officers, 70 or 7.4 percent of whom were black and 9 or .95 percent of whom were female.

9. As of September of 1979, there were approximately 336 sworn officers on the CPD holding a rank above that of entry level police officer, 7 or 2.1 percent of whom were black and 3 or .89 percent of whom were female.

10. Of the approximately 128 officers holding the rank of sergeant in September of 1979, 2 or 1.6 percent were black and none was female.

11. Of the approximately 152 officers holding the rank of police specialist in September or [sic] 1979, 4 or 2.6 percent were black and 3 or 2.0 percent were female.

12. At the time this action was filed in July of 1980, the sworn force of the CPD consisted of approximately 1,011 officers, 101 or 9.9 percent of whom were black, and 34 or 3.4 percent of whom were female.

13. In July of 1980, there were approximately 317 officers on the CPD holding a rank above that [sic] entry level police officer, 6 or 1.9 percent of whom were black and 3 or .95 percent of whom were female.

14. Of the approximately 118 officers holding the rank of sergeant in July of 1980, 1 or .85 percent was black and none was female.

15. Of the approximately 142 officers holding the rank of police specialist in July of 1980, 4 or 2.8 percent were black and 3 or 2.1 percent were female.

16. Blacks composed approximately 33.7 percent of the applicants for entry level police officer positions for the two selection processes resulting in eligibility lists from which entry level officers were appointed between 1972 and 1979.

17. From 1972 until the establishment of the February 1980 entry level police officer eligibility list, the CPD appointed approximately 275 entry level officers, 56 of whom were black.

18. Prior to September of 1974, the CPD limited the opportunities of women in the sworn ranks of the CPD to 10 policewoman positions; required more education of female than male applicants for entry level positions with the CPD; did not provide promotional opportunities for women beyond the police specialist rank; and assigned women exclusively to the juvenile division of the CPD.

19. The female applicant rate for the selection process which resulted in the establishment of the September 1974 entry level eligibility list from which entry level officers were appointed from September 1974 until the establishment of the February 1980 entry level eligibility list, was approximately 22.8 percent.

20. Of the 83 police officers hired from the entry level eligibility list established in September of 1974, 4 or 4.8 percent were female.

21. The black applicant rate for the selection process for entry level police officers resulting in the February 1980 eligibility list was 53.5 percent.

22. The black pass rate on the entry level written examination used to screen applicants for the February 1980 police officer eligibility list was 79.5 percent of the white pass rate.

23. The female applicant rate for the selection process for entry level police officer resulting in the February 1980 eligibility list was 34.8 percent.

24. The female pass rate on the physical agility test used to screen applicants for the February 1980 policy entry level eligibility list was 63.3 percent of the male pass rate.

25. Of 88 appointments to the position of police specialist from 1972 until the filing of this action, 2 (2.3 percent) were filled by black officers, while the pool of persons eligible for such promotions was approximately 7 percent black.

26. Of 102 appointments to the position of sergeant from 1972 until the filing of this action, 1 (.98 percent)

was filled by a black officer, while the pool of persons eligible for such promotions was approximately 7.6 percent black.

27. No women have been appointed to the position of sergeant from 1972 until the filing of this action.

28. No women, other than those for whom positions were set aside within the juvenile division, have been appointed to the position of police specialist from 1972 until the filing of this action.

29. The City of Cincinnati has appointed officers in rank order from eligibility lists for the positions of police specialist and sergeant from 1972 until the filing of this action.

30. The eligibility lists for police specialist and sergeant have been composed by placing the candidates in rank order from highest to lowest composite score, 90 percent of which is attributable to a written test score and 10 percent of which is attributable to supervisory ratings, to which seniority points are added for years of service with the CPD.

31. Black candidates for the police specialist and sergeant position have obtained as a group lower scores on the written component of both the police specialist and the sergeant's promotional process from 1972 until the filing of this action, and the differences between the black and white mean scores on both the police specialist and sergeant's written examinations during this time are statistically significant at the .05 level of significance.

32. A slight difference in written examination score produces a marked difference in placement on promotional eligibility lists. For instance, on the 1977 sergeant's eligibility list, 33 persons placed between a score of 92 and 89 on the list.

33. The City of Cincinnati has no professional study of the validity of the police specialist examinations administered in 1972, 1973 and 1975.

34. The City of Cincinnati has no professional study of validity for the sergeant's examinations administered in 1972, 1973, or 1975. While the City did consult an outside expert in connection with the 1977 sergeant's examination, no validity study meeting the standards of the Uniform Guidelines on Employee Selection Procedures (1978), 43 Fed. Reg. 38290 (August 25, 1978) was produced.

35. The City of Cincinnati started actively recruiting blacks with specific programs in the black community in 1967. There was little response to those efforts. In 1972, the City abandoned its prior testing practices and adopted new testing techniques designed to increase black performance. More emphasis was put on the recruiting of blacks. In 1974, recruiting efforts were expanded to include the recruiting of women for regular police service.

36. In 1975, the City of Cincinnati began to suffer serious financial difficulties. All hiring was curtailed and layoffs, including the layoff of police officers, followed. No persons were hired into the Police Division again until 1980.

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IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF CINCINNATI, OHIO et al., Defendants.	)	CIVIL ACTION NO. C-1-80-369

AFFIDAVIT
(Filed June 26, 1981)

I, Vivian B. Toler, do hereby depose and state as follows:

1. I am the chief paralegal specialist for the Federal Enforcement Section of the Civil Rights Division, Department of Justice.

2. As part of my responsibilities in that position, I analyze employment statistics and apply statistical tests to sets of data.

3. I have analyzed the statistics in the Joint Stipulations Between the City of Cincinnati and the United States (hereinafter Stip. No.) in this action using the binomial approximation model adopted by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299, 308-09 n.14 (1977).

4. The binomial approximation (standard deviation test), which is calculated by taking the square root of the

product of the total number in a sample (N) times the probability of selecting a member of the group in question (q) times the probability of selecting a non-member of the group in question (p) ($S D = \sqrt{N \times q \times p}$), enables the calculation of the disparity between the number of persons actually selected and the number of persons expected to be selected.

5. I applied this test to the workforce representation of blacks and women in the Cincinnati Police Division (CPD) in September of 1979, compared to the labor force representation of blacks and women in the City of Cincinnati, the figures contained in Stip. No. 7 and 8. The difference between the expected and observed number of blacks and women employed was 12.5 and 26.0 standard deviations, respectively.

6. I applied the test to the workforce representation of blacks and women in the CPD in July of 1980, the figures contained in Stip. No. 7 and 12. The disparity between the expected and observed was 11.0 standard deviations for blacks and 25.2 standard deviations for women.

7. I applied the test to the applicant data for blacks from 1972 through 1979, and the black hires in the same time period, the figures contained in Stip. No. 16 and 17. The disparity between the expected and observed number of black hires was 4.7 standard deviations.

8. I applied the test to the applicant data for females for the 1974-1975 eligibility list and the female hires from that list, the figures contained in Stip. No. 19 and 20. The disparity between the expected and observed number of female hires was 3.9 standard deviations.

9. I applied the test to the expected number of black promotions to police specialist from 1972 until the filing of this action and the actual number so promoted, the figures contained in Stip. No. 25. The difference between the expected and observed number of blacks promoted was 1.67 standard deviations.

10. I applied the test to the expected number of black promotions to the sergeant's position from 1972 until the filing of this action and the actual number so promoted, the figures contained in Stip. No. 26. The difference between the expected and observed number of black promotions to sergeant was 2.6 standard deviations.

11. I determined, by consulting standard statistical tables, that each of the standard deviation disparities I calculated in paragraphs 5-10, above, were statistically significant at the .05 level or greater, using a one-tailed test.

I hereby declare, under penalty of perjury and pursuant to 28 U.S.C. Section 1746, that the foregoing is true and correct.

Executed this 25 day of June, 1981.

/s/ Vivian B. Toler
VIVIAN B. TOLER

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF CINCINNATI, OHIO, et al. Defendants.	)	J. RUBIN CIVIL ACTION NO. C-1-80-369

CONSENT DECREE
(Filed Aug. 13, 1981)

The Plaintiff United States of America filed its Complaint in this action against the City of Cincinnati, the Cincinnati Police Division, and the members of the Cincinnati Civil Service Commission [hereinafter collectively referred to as the City defendants], alleging that the City defendants are engaged in a pattern or practice of discrimination in employment on the basis of race and sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq., the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. Section 1242, and the nondiscrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. Section 3789d(c)(3).

On August 26, 1980, Queen City Lodge No. 69, Fraternal Order of Police [hereinafter sometimes referred to

as the FOP] was granted leave to intervene as a party defendant in this action.

The United States and the defendants, being desirous of settling this action by appropriate decree, agree to the jurisdiction of this Court over the respective parties and subject matter of this action and hereby waive the entry of findings of fact and conclusions of law. The parties, sharing the goal of insuring equal employment opportunity within the Cincinnati Police Division and desiring to avoid protracted and unnecessary litigation, accept this Decree as final and binding among the parties signatory hereto as to the issues resolved herein, as well as on all persons who consent to the relief hereinafter provided. This Decree, being entered with the consent of the defendants, shall not constitute an admission, adjudication or finding on the merits of the case, and the defendants deny that any unlawful discrimination has occurred.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The City defendants, their officials, agents, employees and successors, and all persons in active concert or participation with them in the performance of police functions covered by the Complaint filed in this action are permanently enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any black or female employee of, or any black or female applicant or potential applicant for, employment with the Cincinnati Police Division [hereinafter sometimes referred to as the CPD] because of such individual's race or sex. Specifically, the City defendants shall not discriminate against any individual in hiring,

promotion, assignment, upgrading, training, compensation, discipline or discharge in whole or in part because of such individual's race or sex.

Further, the City defendants shall not retaliate against or in any respect adversely affect any person because that person has opposed discriminatory policies or practices or because of that person's participation or cooperation with the initiation, investigation, litigation or administration of this Decree. Remedial actions and practices required by the terms of this Decree or permitted to effectuate and carry out programs under this Decree shall not constitute unlawful discrimination within the meaning of 42 U.S.C. Section 2000e-2(a).

For purposes of this Decree, it is understood that the defendant Fraternal Order of Police does not recognize the validity or constitutionality of Section 124.90 of the Ohio Revised Code.

2. It is the purpose and intent of this Decree to insure that blacks and women are not disadvantaged by the hiring, promotion, assignment and other employment policies and practices of the CPD and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunity is provided to all. The City defendants have agreed that in determining whether this purpose has been achieved, and appropriate standard of comparison is the proportion of qualified blacks and women in the labor force of the City of Cincinnati and the City defendants have agreed to undertake as the long

term goal of this Decree, subject to the availability of qualified applicants, approximating that proportion of blacks and women in all the sworn ranks of the CPD.

In meeting this long term goal, the City defendants adopt the interim goals set out below, on an annual basis, in filling vacancies within the sworn ranks of the CPD:

A. It is recognized that the CPD has recently made substantial efforts to increase the representation of blacks and women in the sworn entry rank of police officer, which are reflected in the thirty-four (34) percent black and twenty-three (23) percent female composition of the 1980 Police Recruit List. The City defendants agree to continue such recruitment efforts and to adopt, as an interim measure, the goal of hiring qualified black and female officers in at least the percentages which they are represented on the 1980 Police Recruit List. For purposes of determining compliance with this interim goal, persons who fail to complete probation shall not be counted as having been appointed, and a black female may be counted as both black and female.

B. For the sworn promotional rank of police specialist and the sworn promotional rank of police sergeant, the interim goal shall to be to fill vacancies in an affirmative manner so that at the termination of this Decree, blacks and women will hold a percentage of those ranks equal to the percentage of the blacks and women in the pool of candidates eligible for promotion to such positions. It is the parties'

expectation that during the two year period subsequent to the entry of this decree, approximately twenty five (25) percent of the vacancies for the police specialist position and approximately twenty five (25) percent of the vacancies for the police sergeant position are filled with qualified black and female candidates. The City defendants shall appoint qualified blacks and women within this goal in a manner which reflects their proportionate representation in the ranks eligible for these positions in relation to each other, e.g., if twice as many blacks as female candidates are eligible for those positions, it is expected that qualified blacks will be selected to fill approximately twice the number of vacancies as qualified women. Two (2) years from the entry of this decree, or at an earlier time if justice so requires, the parties shall meet to determine whether adjustment of this interim goal is necessary for achievement of the long term goals of this decree.

However, nothing herein shall be interpreted as requiring the City defendants to hire unnecessary personnel, or to hire, transfer or promote a person who is less qualified over a person who is more qualified on the basis of properly validated employment selection devices within the meaning of the Uniform Guidelines on Employee Selection Procedures (1978), 43 Fed. Reg. 38290 (Friday, August 25, 1978) [hereinafter *Uniform Guidelines*].

3A. In order to establish a list of qualified applicants for entry level sworn positions in the Cincinnati Police Division, the City may administer a written examination as well as a physical

agility test on a pass/fail basis. Neither the written or physical examinations will constitute a sufficient defense for failure to meet the goals set out in paragraph 2, above, unless parties agree or the Court finds that these selection procedures have been properly validated in accordance with the *Uniform Guidelines, supra.*

3B. For the purpose of establishing a list of qualified candidates for promotion to the grade of police specialist the following procedures shall be followed:

1. A promotional examination for the grade of police specialist shall be administered on September 15, 1981, and thereafter, in accordance with the provisions of Chapter 124, Ohio Revised Code, the Charter of the City of Cincinnati and the Ohio Constitution.

2. It is agreed that as of the date of the entry of this decree there are 152 authorized and funded positions in the grade of police specialist in the CPD, that 27 vacancies exist in the grade and that all current vacancies shall be filled upon release of the promotion eligible list by the Civil Service Commission. During the term of this decree, after the grading of each required promotional examination for the grade of police specialist, rank order promotion eligible lists shall be established by the Civil Service Commission pursuant to state civil service law, and each resulting promotion eligible list shall be valid for one (1) year or until the list is exhausted, whichever shall first occur.

3. Subsequent to the release of the first promotion eligible list of the grade of police specialist in accordance with the terms of this

decree, the required complement of police specialists shall be determined by the city defendants and a "Notice of Complement" shall be prepared and posted on all bulletin boards in all police locations, no later than one hundred twenty (120) days prior to the expiration of the existing promotion eligible list. Said "Notice of Complement" shall set the authorized number of police specialists effective the day after the expiration of the current eligible list, provided that if the City defendants and the FOP have an enforceable agreement establishing the complement of police specialists such complement shall not be reduced in number during the term of that agreement.

4. In the event that the results of the grading of any promotional examination for the grade of police specialist results in the release of a promotion eligible list which fails to assure promotions of blacks and women in accordance with the terms of the decree, then the City defendants shall establish and fund such required additional police specialist positions and promote such additional blacks and females in rank order from the existing promotion eligible list as are required to fulfill the terms of this decree.

Any position established and funded pursuant to the provisions of this Decree in addition to those in the established complement shall be considered double fill complement positions in existence at the time of the release of the "Notice of Complement" by the City defendants; provided, however, that after the expiration of any existing eligibility list, a vacancy for

promotion purposes shall not exist in the complement until such time as the total number of persons holding the grade of specialist falls below the complement established by the "Notice of Complement."

3C. For the purpose of establishing a list of qualified candidates for promotion to the rank of police sergeant the following procedures shall be followed:

1. A promotional examination for the rank of police sergeant shall be administered on September 1, 1981 and September 11, 1981 and thereafter, in accordance with the provisions of Chapter 124, Ohio Revised Code, the Charter of the City of Cincinnati and the Ohio Constitution.

2. It is agreed that as of the date of the entry of this Decree there are 127 authorized and funded positions in the rank of police sergeant in the CPD, that 21 vacancies exist in the rank and that all current vacancies shall be filled upon release of the promotion eligible list by the Civil Service Commission. During the term of this Decree, after the grading of each required promotional examination for the rank of police sergeant, rank order promotion eligible lists shall be established by the Civil Service Commission pursuant to state civil service law, and each resulting promotion eligible list shall be valid for one (1) year or until the list is exhausted, whichever shall first occur.

3. Subsequent to the release of the first promotion eligible list for the rank of police sergeant in accordance with the terms of this Decree, the required complement of police

sergeants shall be determined by the City defendants and a "Notice of Complement" shall be prepared and posted on all bulletin boards in all police locations, no later than one hundred twenty (120) days prior to the expiration of the existing promotion eligible list. Said "Notice of Complement" shall set the authorized number of police sergeants effective the day after the expiration of the current eligible list.

4. In the event that the results of the grading of any promotional examination for the rank of police sergeant results in the release of promotion eligible list which fails to assure promotions of blacks and women in accordance with the terms of this Decree, the city defendants shall establish and fund such required additional police sergeant positions and promote such additional blacks and females in rank order from the existing promotion eligible list as required to fulfill the terms of this Decree.

Any position established and funded pursuant to the provisions of this Decree in addition to those in the established complement shall be considered double fill complement positions in existence at the time of the release of the "Notice of Complement" by the City defendants; provided, however, that after the expiration of any existing eligibility list, a vacancy for promotion purposes shall not exist in the complement until such time as the total number of persons holding the rank of sergeant falls below the complement established by the "Notice of Complement."

4. [sic] The city defendants shall provide to plaintiff within thirty (30) days of entry of this Decree a list of all disqualifying factors for employment as a police officer and a list of those factors which are not automatically disqualifying, but which are considered in evaluating an applicant's character or suitability for employment. These lists may be amended and supplemented from time to time as necessary to correct oversights, to make adjustments required by changing circumstances, or to prevent injustice. Plaintiff shall review these factors and notify the CPD of its position as to validity of these considerations. Approval or acquiescence of plaintiff in the use of factors which are not automatically disqualifying shall not be deemed to be approval of the manner in which the factor may be utilized with respect to any particular individual.

5. No additional appointments shall be made from existing eligibility lists for positions covered by this Decree and said lists shall be deemed to have expired for all purposes with the entry of this Decree, unless the City defendants can show that continued use of the list will allow compliance with the interim goals established in this Decree.

   Before establishing any eligibility list for the position of police officer, police specialist or police sergeant, the City defendants shall determine whether, based on estimated hiring during the life of the list and the race and sex composition of the list, the CPD will be able to meet its interim hiring goals from that list. Should compliance not be reasonably expected given the composition of the

list, the City defendant's shall immediately notify the plaintiff in writing of the matter, specifying all relevant details, including a copy of the list, with candidates identified by race and sex, and the number of anticipated appointments over the life of the list. The affected parties shall then meet within a reasonable period to discuss alternative methods by which the CPD can meet its goals.

6. The City defendants shall make all good faith efforts, consistent with the needs of the CPD, to place black and female officers in specialized job assignments where they have not previously been represented.

7. The City defendants shall retain for a period of five (5) years all records relating to the recruitment, selection, appointment, promotion, training, assignment and discipline of persons covered by this Decree, including applications, identified by race and sex, as set forth in Section 4 of the *Uniform Guidelines, supra;* all medical and background investigation files, training evaluations, evaluations of applicants and employees, eligibility lists and appointments, with persons identified by race and sex; and all records relating to discipline and discharge. Plaintiff shall have the right to inspect any and all such documents upon reasonable notice to the City defendants without further order of this Court. In addition, the City defendants shall make available such information or records as plaintiff requests in writing, provided such requests shall not be unduly burdensome.

8. For purposes of this Decree, a reporting period shall run from July 1 through December 31 and from January 1 through June 30 for each year. Thirty (30) days after the close of each reporting period the City defendants shall provide to plaintiff:

(a) The number of persons by race and sex applying for sworn positions in the CPD during the reporting period and the number by race and sex who passed and failed each step of the selection process thereafter, previous to appointment.

(b) The number of persons by race and sex, appointed or promoted to each sworn position in the CPD during the reporting period.

(c) Copies of each eligibility list established for sworn positions during the reporting period, with persons identified by race and sex.

(d) The name, address, telephone number, race and sex of each person terminated or who resigned from a sworn position during the reporting period, and a statement of the reasons for termination or resignation.

(e) The total number of persons in each job classification in the CPD by race and sex as of the close of the reporting period.

(f) An estimate of the number of appointments to sworn positions anticipated by the CPD in each sworn job classification during the next reporting period.

The City defendants shall also provide to plaintiff, within forty-five (45) days of the entry of this Decree, a report showing the number of persons by race and sex, in each sworn rank of the CPD as of August 1, 1981.

9. At any time after five years from the date of this Decree, the City defendants may notify plaintiff with sixty (60) days notice, of their desire to terminate this Decree; and upon showing of achievement of the goals of this Decree, it shall be terminated. Absent such a showing, this Decree shall be extended and if necessary amended, to serve the purposes of justice and achievement of the goals of this Decree. The Court expressly declines a retention of jurisdiction in this matter.

Entered this ___ day of ___, 1981.

/s/ Carl B. Rubin
UNITED STATES
DISTRICT JUDGE

Agreed:

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United States Attorney

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AMENDMENT 14

SECTION 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives-Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. Public debt not to be questioned – Debts of the Confederacy and claims not to be paid

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 – CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 124.26 Eligible Lists; Veteran's Preference; Existing Employees Who Pass Examination

(A) Except as provided in divisions (B) and (C) of this section, from the returns of the examinations the director of administrative services shall prepare an eligible list of the persons whose general average standing upon examinations for such grade or class is not less than the minimum fixed by the rules of the director, and who are otherwise eligible; and such persons shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by the examination without reference to priority of the time of examination. In the event two or more applicants receive the same mark in an open competitive examination, priority in the time of filing the application with the director shall determine the order in which their names shall be placed on the eligible list; provided, that applicants eligible for veteran's preference under section 124.23 of the Revised Code shall receive priority in rank on the eligible list over nonveterans on the list with a rating equal to that of the veteran. Ties among veterans shall be decided by priority of filing the application. In the event of two or more applicants receiving the same mark on a promotional examination, seniority shall determine the order in which their names shall be placed on the eligible list. The term of eligibility of each list shall be fixed by the director at not less than one nor more than two years. When an eligible list is reduced to three names or less, a new list may be prepared. The director may consolidate two or more eligible lists of the same kind by the rearranging of eligibles named therein, according to their grades.

(B) A person serving as a provisional employee who completes at least six months of service or his probationary period, whichever is longer, and passes an examination for the class or grade in which he holds his position shall be appointed as a permanent employee in the position before the director of administrative services prepares an eligible list.

(C) A permanent, certified employee who passes an examination for a grade or class in which a position is vacant shall be appointed to the position before the director of administrative services prepares an eligible list. If more than one permanent, certified employee passes the examination for the vacant position, the director shall prepare an eligible list consisting only of permanent, certified employees who have received a mark on the examination of not less than the minimum fixed by the director, in the same manner as provided under division (A) of this section. No permanent, certified employee shall, under this division, be appointed to a vacant position or placed on an eligible list for a vacant position in any department, office, or other governmental unit that is not the unit in which he was serving at the time of the examination.

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§ 124.27 Appointments; Certified And Provisional; Probationary Period

The head of a department, office, or institution, in which a position in the classified service is the be filled,

shall notify the director of administrative services of the fact, and the director shall, except as otherwise provided in this section and sections 124.30 and 124.31 of the Revised Code, certify to the appointing authority the names and addressees of the three candidates standing highest on the eligible list for the class or grade to which the position belongs; provided, that the director may certify less than three names if three names are not available. When less than three names are certified to an appointing authority, appointment from that list shall not be mandatory. When a position in the classified service in the department of mental health or the department of mental retardation and developmental disabilities is to be filled, the director of administrative services shall make such certification to the appointing authority within seven working days of the date the eligible list is requested.

The appointing authority shall notify the director of such position to be filled, and he shall fill such position by appointment of one of the three person certified to him. If more than one position is to be filled, the director of administrative services may certify a group of names for the eligible list and the appointing authority shall appoint in the following manner: Beginning at the top of the list, each time a selection is made it must be from one of the first three candidates remaining on the list who is willing to accept consideration for the position. If an eligible list becomes exhausted, and until a new list can be created, or when no eligible list for such position exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified. A person certified from an eligible

list more than three times to the same appointing authority for the same or similar positions, may be omitted from future certification to such appointing authority, provided that certification for a temporary appointment shall not be counted as one of such certifications. Every soldier, sailor, marine, coast guardsman, member of the auxiliary corps as established by congress, member of the army nurse corps, or navy nurse corps, or red cross nurse who has served in the army, navy, or hospital service of the United States, and such other military service as is designated by congress in the war with Spain, including the Philippines insurrection and the Chinese relief expedition, or from April 21, 1898, to July 4, 1902, World War I, World War II, or during the period beginning May 1, 1949, and lasting so long as the armed forces of the United States are engaged in armed conflict or occupation duty, or the selective service or similar conscriptive acts are in effect in the United States, whichever is the later date, who has been honorably discharged or separated under honorable conditions therefrom, and is a resident of Ohio, and whose name is on the eligible list for a position, shall be entitled to preference in original appointments to any such competitive position in the civil service of the state and the civil divisions thereof, over all persons eligible for such appointments and standing on the list therefor, with a rating equal to that of each such person. Appointments to all positions in the classified service, that are not filled by promotion, transfer, or reduction, as provided in sections 124.01 to 124.64 of the Revised Code, and the rules of the director prescribed under such sections, shall be made only from

those persons whose names are certified to the appointing authority, and no employment, except as provided in such sections, shall be otherwise given in the classified service of this state or any political subdivision thereof.

All original and promotional appointments, including provisional appointments made pursuant to section 124.30 of the Revised Code, shall be for a probationary period, not less than sixty days nor more than one year, to be fixed by the rules of the director, except as provided in section 124.231 of the Revised Code, or except original appointments to a police department as a policeman or policewoman, or to a fire department as a fire fighter which shall be for a probationary period of one year, and no appointment or promotion is final until the appointee has satisfactorily served his probationary period. Service as a provisional employee in the same or similar class shall be included in the probationary period. If the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period after completion of sixty days or one-half of his probationary period, whichever is greater. If the appointing authority's decision is to remove the appointee, his communication to the director shall indicate the reason for such decision. Dismissal or reduction may be made under provisions of section 124.34 of the Revised Code during the first sixty days or first half of the probationary period, whichever is greater. Any person appointed to a position in the classified service under sections 124.01 to 124.64 of the Revised Code, except temporary and exceptional appointments, shall be or become forthwith a resident of the state.

124.90 Waiver of laws to avoid federally prohibited discrimination

(A) Any municipal corporation may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter as they apply to that municipal corporation if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(B) Any municipal corporation that has adopted the provisions of this chapter as part of its charter may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter so adopted if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(C) A municipal corporation may not under this section make any waiver, suspension, or alteration of provisions of this chapter that relate to matters of promotions within the municipal civil service.

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

(2)

No. 91-2001

In The

Supreme Court of the United States

October Term, 1992

RICHARD VOGEL,

Petitioner,

v.

THE CITY OF CINCINNATI and
SCOTT JOHNSON, CITY MANAGER and
CIVIL SERVICE COMMISSION OF THE
CITY OF CINCINNATI and
LAWRENCE WHALEN, POLICE CHIEF OF THE
CITY OF CINCINNATI and
THE SENTINEL POLICE ASSOCIATION,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF RESPONDENTS CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION AND LAWRENCE WHALEN IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether a voluntary Consent Decree to which the City of Cincinnati is a party, the overall purpose of which is to insure equal employment opportunity for minorities and females in the City's Police Division, which is based on a history of discriminatory employment practices for minorities and females, and which contains inherently flexible goals to redress those discriminatory practices, is constitutional under the Fourteenth Amendment of the United States Constitution as applied to the Petitioner.

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STATEMENT OF THE CASE

In 1980, the Department of Justice, on behalf of the United States, commenced an action against the City of Cincinnati, the Cincinnati Police Division, and the Cincinnati Civil Service Commission (hereinafter, the City) alleging that they had engaged in hiring and promotion practices that discriminated against black and women police recruit candidates in violation of Title VII of the Civil Rights Act of 1964. On August 13, 1981, the City entered into a Consent Decree with the Fraternal Order of Police, which had intervened in the case, and with the Department of Justice. (Pet. Appendix 31A). The long term goal of the decree was to remedy any disadvantage that resulted from the City's past discrimination against blacks and women. The City agreed that the appropriate standard for determining whether this purpose has been achieved was to compare the proportion of qualified blacks and women in the labor force of the City to approximate that proportion in all the sworn ranks of the Cincinnati Police Division (hereinafter CPD). (Pet. Appendix 31A, pp. 33A-34A). In order to meet this long term goal, the City adopted an interim goal of hiring qualified black and female officers in at least the same percentages in which they were represented in the 1980 police recruit list, which at that time was 34% black and 23% women. (Pet. Appendix 31A, p. 34A).

Anytime after five years from the date of the decree, and upon a showing by the City that the long term goals of the decree were met, the City could seek termination of the decree. (Pet. Appendix 31A, p. 43A). At the time of the Petitioner's suit, the long term goals of the decree

were not met, and thus the interim goals were still in effect.

The decree's language is clear that no quotas were required. It states in relevant part that "[n]othing herein shall be interpreted as requiring the City defendants to hire unnecessary personnel, or to hire, transfer or promote a person who is less qualified over a person who is more qualified . . . " (Pet. Appendix 31A, p. 35A).

Petitioner Richard Vogel, a white male, was not selected as a member of the police recruit class that began training in October, 1989. Although he was appointed to a recruit class shortly thereafter, he commenced an action against the City seeking back pay, retroactive seniority and other benefits for the period between October, 1989 and his appointment.

Petitioner filed his original Complaint against the City in the United States District Court for the Southern District of Ohio, Western Division, on October 5, 1989. The original suit was against all the named respondents except the Sentinel Police Association, a group which represents black Cincinnati Police Officers. The Sentinel Police Association was subsequently permitted to intervene without objection.

Petitioner filed a Motion for Summary Judgment in the District Court and the City and the Intervenors responded with Cross-Motions for Summary Judgment. On April 15, 1991, the District Court denied Petitioner's Motion for Summary Judgment and granted the Respondents' Motions for Summary Judgment. (Pet. Appendix 1A). The court concluded that the Consent Decree set forth goals of hiring qualified black and female officers

and was intended to be an interim measure. The court never interpreted the decree as requiring quotas.

Thereafter, Petitioner filed a Notice of Appeal, seeking review by the United States Court of Appeals for the Sixth Circuit. Following briefing and oral argument, on March 13, 1992, the Court of Appeals affirmed the District Court's decision. (Pet. Appendix 6A). The Court of Appeals held that the Petitioner lacked standing to collaterally challenge the City's interpretation of the decree, but did have standing to challenge the City's hiring policy, adopted pursuant to the decree, as applied to him. The court also held that the "affirmative action hiring policy" adopted by the City pursuant to the decree did not violate the Equal Protection Clause of the Fourteenth Amendment. It is from the Sixth Circuit's decision that this Petition for a Writ of Certiorari was taken.

ARGUMENT FOR DENYING THE PETITION

1. The City has never set forth a hiring quota pursuant to the Consent Decree; rather, it has implemented the interim goals set forth in the decree which will end once the decree's overall goal of remedying past discrimination is met.

Petitioner argues that the affirmative action plan adopted by the City, "to the extent that it constituted a quota," is unconstitutional. (Pet., p. 18). Petitioner does not attack the Consent Decree itself, for he states quite succinctly in his Petition, "[A]s has been established, the Consent Decree did not authorize a quota," (Pet., p. 17). Since the Consent Decree itself is a valid agreement

entered with the purpose of remedying prior discrimination, the Petitioner must have established that the City's policies created a quota system. Because the Petitioner has failed in this endeavor, this Court should deny the Petition for a Writ of Certiorari.

To meet the goals for police hiring, the City has implemented for each written test given for hiring, an administrative system of three lists, one containing the test results of white males, one containing the test results of blacks and one containing the test results of females. The written test is just one step of an extensive six step process of becoming a police recruit, the entire screening procedure consisting of a written examination, physical ability test, medical examination, background investigation, psychological evaluation and the Rule of Three Process.[1]

The purpose of the written exam is to determine which applicants possess the minimum qualifications needed to be trained to be entry level police recruits. A score of 60% constitutes a passing score for all individuals including whites, blacks and females. All applicants who receive a passing score on the written exam are qualified to advance to the subsequent steps of the hiring process.

---

[1] The Rule of Three is a selection method mandated by Section 124.27 of the Ohio Revised Code. The rule permits the police chief to select a candidate for hiring from the top three people on an eligible list. It does not guarantee employment to those ranking highest on a given list, but only guarantees hiring consideration. (Pet. Appendix 48A).

After the applicants successfully advance through the first five steps of the selection process, they are then placed on an eligible list and certified to the police chief for consideration for hiring and go through the Rule of Three process. All applicants, majority, minority and female, that are certified for consideration to the police chief for hiring in the Rule of Three process are qualified to be police recruits.

In an attempt to persuade this Court of the unconstitutionality of the City's hiring policies, the Petitioner uses the term "quota" liberally throughout his Petition, yet there has been no evidentiary finding that the City implemented a quota system. The Petitioner simply misstates this critical fact in an attempt to augment his claim. The City has admitted that, acting pursuant to the decree approved by the District Court in 1981, it has implemented interim *goals* for hiring blacks and women. The District Court also concluded that the decree's goals were an "interim measure." (Pet. Appendix 1A). Testimony by City Manager C. Scott Johnson and City Personnel Analyst Carol Callahan also support this conclusion. In their depositions, each stressed the differences between a goal and a quota and further testified that the City was implementing the goals of the Consent Decree by using the dual lists scheme.[2]

---

[2] Mr. Johnson and Ms. Callahan also each testified that in a police recruit class hired subsequent to the class at issue in this matter, the 34% interim hiring goal for black police recruits was not met because a sufficient number of qualified blacks was not available. That evidence alone demonstrates the hiring goals of the decree are not rigid quotas.

The distinction between the City's interim goals and quotas is more than mere semantics. The Petitioner is attempting to circumvent the fact that the decree does not authorize a quota by claiming that the City "created [a quota] *outside* the Consent Decree." (Pet., p. 7) (emphasis added). Yet, the Petitioner has never shown that the City was acting outside the decree; in fact, the evidence clearly shows that the City was implementing the goals of the decree. This Court should therefore not grant Certiorari.

2. The City's affirmative action plan, created pursuant to the goals set forth in the Consent Decree, does not violate the Equal Protection Clause of the Fourteenth Amendment.

In *Martin v. Wilks*, 490 U.S. 755 (1989), this Court held that people who are not made parties to a consent decree have standing to commence an action challenging the constitutionality of the decree as applied to them. *Id.* at 762. Even though the Petitioner admits that the Consent Decree does not establish a quota, he still claims that the City's affirmative action plan, made pursuant to the goals of the decree, violates the Equal Protection Clause.

Petitioner argues that race or sex based affirmative action plans must be subjected to "strict scrutiny" review. While this Court has subjected race-conscious affirmative action plans to strict scrutiny review in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion), gender based classifications have not been subjected to this type of review. Instead, this Court has subjected gender based classifications to a different level

of scrutiny. *Craig v. Boren*, 429 U.S. 190, 198 (1976) ("[C]lassifications by gender must serve important government objectives and must be substantially related to achievement of those objectives."). *See also Wengler v. Druggist Mutual Ins. Co.*, 446 U.S. 142 (1980). This type of scrutiny, often referred to as "mid-level" or "intermediate," "is regarded as a less stringent judicial standard of review than 'narrowly tailored to serve a compelling interest'." *Associated General Contractors of California v. San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987).

A. The City's affirmative action plan with respect to the hiring of black police officers is intended to remedy identifiable prior discrimination by the City, and this compelling governmental interest is met by narrowly tailored goals.

Any racial classification must be justified by a compelling governmental interest. *Wygant*, 476 U.S. at 274. A state or local government unquestionably has a compelling interest in remedying past and present discrimination by a state actor. *Id.* at 286. The level of scrutiny does not change merely because the challenged classification works against a group that historically has not been subject to governmental discrimination. *Croson*, 488 U.S. at 494. This Court has previously upheld affirmative action plans intended to remedy identifiable prior discrimination by public police and fire agencies. *United States v. Paradise*, 480 U.S. 149 (1987); and *International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 510 (1986).

Although Congress may identify and redress the effects of society-wide discrimination, a city must have a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277. This Court has stated, "[A]n amorphous claim that there has been past discrimination in a particular industry . . . " is not enough. *Croson*, 488 U.S. at 499. However, evidence of wide statistical disparities may justify an affirmative action policy adopted by a public employer. *Wygant*, 476 U.S. at 274-275 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977)). Where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. *Hazelwood*, 433 U.S. at 308. Therefore, by using a pool of qualified minorities to show evidence of wide statistical disparities, a city may adopt an affirmative action plan in order to remedy such prior discrimination, and the city will thus meet its burden of showing a compelling governmental interest under the strict scrutiny analysis.

The Consent Decree herein specifically sets forth the type of statistical evidence to be used by the City in order to determine the longevity of the affirmative action plan. It states:

> The City defendants have agreed that in determining whether this purpose has been achieved, an appropriate standard of comparison is the proportion of qualified blacks and women in the labor force of the City of Cincinnati. . . .

(Pet. Appendix 31A, p. 33A). This Court has previously found that the relationship of numerical goals to the

relevant labor market was one factor to look at in determining whether a race-conscious affirmative action plan was appropriate. *Paradise*, 480 U.S. at 171 (1987).

Here, the City, specifically the CPD, was shown to have discriminated in the hiring and promotion of black police officers. In coming to this conclusion, an analysis was made between the statistical discrepancies of the number of blacks in the applicant pool from which the police force was selected and the racial composition of the City police force. Vivian Toler, a statistical expert, made a statistical analysis according to the binomial approximation model adopted by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 496-497, n.17 (1977); and *Hazelwood*, 433 U.S. at 308-309, n.14. Under this model, a difference of more than two or three standard deviations allows an inference that race had played a role in the City's hiring or promotion policies. *Hazelwood*, 433 U.S. at 309, n.14 (quoting *Castaneda*, 430 U.S. at 497, n.17). The disparity between the expected rate of black appointments and the actual rate was 4.7 standard deviations. The disparity between the expected and actual members of blacks on the police force was 12.5 standard deviations. The disparity between the expected and actual numbers of promotions of blacks to sergeant's positions was 2.6 standard deviations. (Pet. Appendix 21A, 28A).

The parties to the Consent Decree did not, as the Petitioner suggests, rely on statistical comparisons with the general workforce of the City of Cincinnati. Rather, they compared the composition of the City's police force with the applicant pool from which it was selected, a practice which is in accord with this Court's requirement

that the relevant statistical pool must be from those qualified to undertake a particular task. *See Hazelwood*, 433 U.S. at 308.

The Court of Appeals below concluded that the statistical technique met the *Hazelwood* test. The court cited a prior Sixth Circuit decision stating, "[I]t is only when the statistics disclose the availability of *minorities in the relevant labor pool* substantially exceeded those hired that an inference of deliberate discrimination in employment may be drawn." *Vogel v. City of Cincinnati*, 959 F.2d 594, 600 (6th Cir. 1992) (citing *Long v. City of Saginaw*, 911 F.2d 1192, 1202 (6th Cir. 1990) (emphasis added by *Vogel*). The Seventh and Eighth Circuits have similarly adopted comparisons with the relevant applicant pool. *See Billish v. City of Chicago*, No. 90-1650, No.90-2182, 1992 U.S. App. LEXIS 9262 (7th Cir. 1992); and *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991).

The statistical analysis relied upon by the parties to the Consent Decree clearly showed that there had been discrimination in the hiring and promotion of blacks within the CPD. As such, the City had a compelling interest to remedy such discrimination, and pursuant to the Consent Decree, it implemented interim goals for hiring.

An affirmative action plan implemented to *attain* a racially balanced work force, as opposed to a plan to *maintain* such a force, is more likely to pass Constitutional muster. *See Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987). Likewise, assurances that a consent decree is

temporary in duration might be necessary if an affirmative action program is in effect. *International Ass'n of Firefighters*, 478 U.S. at 510.

The City's hiring plan is intended to attain, rather than maintain, a racially balanced workforce, and once the long term goals of the Consent Decree are met, the City will seek termination of the decree. As the District Court found, the CPD has not yet attained a racially balanced workforce; therefore, the affirmative action plan must remain in effect in order to meet the long term goals of the decree. (Pet. Appendix 1A).

The means chosen by the State to effectuate its compelling governmental interest must be narrowly tailored. *Wygant*, 476 U.S. at 274. In order to remedy the effects of prior discrimination, it may be necessary to take race into account. *Id.* at 280. Once an employer has shown a prima facie case of discrimination, the employer is free to adopt an affirmative action plan. *Johnson*, 480 U.S. at 634, n.11. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. *Id.* at 280-281. Hiring *goals* are a narrowly tailored means of remedying past discrimination. *Id.* at 283-284 (emphasis added). In cases involving hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. *Id.* at 282. Hiring goals do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security, and seniority, involve. *Id.* at 283. Furthermore, "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program." *Wygant*, 476 U.S. at 277-278. Therefore, an affirmative

action plan which implements hiring or promotion goals, and does not implement a blind racial quota or other drastic means such as non-minority layoffs, is narrowly tailored to remedy prior discrimination.

The City's affirmative action plan implements the interim hiring goals established by the Consent Decree. It does not "unnecessarily trammel the interests of the white workers" nor does it create "an absolute bar to the advancement of white employees." *Johnson*, 480 U.S. at 630 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)). Although it might burden some innocent individuals, it does not impose the intrusive injuries that layoffs or blind racial quotas would impose. It is merely a temporary means to remedy identifiable discrimination and attain a racially balanced workforce. For example, the Petitioner, although denied a spot on the October, 1989 recruit class, was appointed to a recruit class shortly thereafter. This type of burden is minimal when compared to the compelling governmental interest of remedying prior discrimination. In this case, the government's compelling need to employ a race conscious remedy outweighs the unfairness to innocent individuals. *See Fullilove v. Klutznick*, 448 U.S. 448, 515 (1980).

The Petitioner argues that the City's hiring goals were arbitrary and completely unrelated to any prior discrimination. In *Paradise*, 480 U.S. at 149, this Court rejected a similar argument where a "one-for-one" promotional requirement was argued to be arbitrary. This Court responded that the argument ignored the fact that the one-for-one requirement is not itself the [long term] goal, but rather an interim goal which represented the speed at which the long term goal was to be achieved. *Id.*

at 180. Similarly, the interim goals implemented by the City are not ultimate goals of the plan; rather, they are short term vehicles for achieving the long term goals of the Consent Decree, namely to remedy any disadvantage from prior racial discrimination and to attain a racially balanced workforce.

The City has thus demonstrated through the use of statistics that there has been prior discrimination in the hiring and promotion of blacks in the CPD. Because this evidence establishes a prima facie case of discrimination, the City is entitled to adopt an affirmative action plan. The City has a compelling interest to remedy the identified discrimination, and it has chosen to do so by implementing the interim goals of the Consent Decree. These interim goals are narrowly tailored and do not place an unjust burden on non-minority candidates. Thus, the City's affirmative action plan does not violate the Equal Protection Clause.

B. The City's affirmative action plan with respect to the hiring of women police officers is intended to remedy identifiable prior discrimination by the City and is clearly a justified gender based classification.

Although Petitioner is a white male challenging the City's hiring policies under the Consent Decree primarily on the basis of alleged "racial quotas," in his Petition he also claims the City's gender based hiring practices are unconstitutional. Classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives. *Craig,*

429 U.S at 198. Remedying prior discrimination is surely an important governmental objective, for this Court has determined that it is a compelling governmental interest under the highest level of scrutiny. *See Wygant*, 476 U.S. at 274-275. Likewise, interim hiring and promotion goals intended to remedy such discrimination, having been found to meet the "narrowly tailored" prong of this Court's strict scrutiny analysis for race based classifications, are easily deemed substantially related under this Court's intermediate scrutiny analysis for gender based classifications.

The City has shown beyond doubt discrimination in the hiring and promotion of women in the CPD. The Joint Stipulations entered by the United States and the City of Cincinnati unequivocally demonstrate that the City discriminated in the hiring and promotion of women. The City limited women to ten positions with the CPD; required more education of female than male applicants for entry level positions with the CPD; prevented women from achieving a rank above police specialist; and assigned women exclusively to the juvenile division of the CPD. As of July, 1980, only 3.4% of the sworn force of the Cincinnati Police Department were women while women constituted 22.8% of the applicants for the force during the period from 1974 to February, 1980. (Pet. Appendix 21A, 28A).

In *Johnson*, 480 U.S. at 616, this Court decided on the constitutionality of an affirmative action plan intended to cure the limited opportunities that existed for women to find employment in certain job classifications where women were not traditionally employed in significant numbers. The plan sought to remedy these imbalances

through "hiring, training and promotion of . . . women throughout the Agency in all major job classifications where they are underrepresented." *Id.* at 634. The Agency thus adopted annual short term hiring and promotion goals that would eliminate this underrepresentation and would lead to the long term goal of a more representative work force. *Id.* at 635. The affirmative action plan stressed that these goals "should not be construed as 'quotas' that must be met, but as reasonable aspirations in correcting the imbalance in the Agency's work force." *Id.* at 635. Furthermore, the plan in no way required the Agency to hire unqualified women, for if it did, the plan would "dictate mere blind hiring" and as such, "its validity could fairly be called into question". *Id.* at 636.

With respect to women, the City's affirmative action plan is clearly justified. The prior discrimination against women has been amply shown from the Joint Stipulations entered between the City and the United States. Remedying such discrimination, as well as attaining a representative police force, are important government objectives. The interim hiring goals of the Consent Decree are substantially related to meet these objectives. Like the affirmative action plan in *Johnson*, the hiring plans are temporary and are intended to lead to the long term goals set forth in the Consent Decree. In addition, the interim goals are not quotas nor did they require the City to hire unqualified women in order to meet the long term objectives of the decree. Finally, the reason the interim goals are still in effect is because the decree's long term objectives have not been met.

CONCLUSION

For the foregoing reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(3)

No. 91-2001

In The

Supreme Court of the United States

October Term, 1992

RICHARD VOGEL

Petitioner,

vs.

THE CITY OF CINCINNATI

and

SCOTT JOHNSON, CITY MANAGER

and

CIVIL SERVICE COMMISSION OF THE CITY OF CINCINNATI

and

THE SENTINEL POLICE ASSOCIATION

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT THE SENTINEL POLICE ASSOCIATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Proposed by Petitioner:

1. When no hiring or promotional quota is authorized by a voluntary consent decree entered into by a political subdivision, does the Fourteenth Amendment to the United States Constitution permit that political subdivision to create a quota, which imposes a societal burden on innocent individuals, in order to meet certain goals for hiring and promoting blacks and females.

Proposed by Respondent the Sentinel Police Association:

2. Whether a nonparty to a decree has standing to impose his interpretation of the decree on the parties.

3. Whether the delay of several months in the hiring of petitioner because of his race pursuant to a consent decree, is justified by a compelling state interest to remedy discrimination under a program that is narrowly tailored to achieve that remedial purpose.

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OPINIONS BELOW

Respondent adopts the statement of the petitioner, subject to a correction on the citation of the district court opinion. The correct cite is *Vogel v. City of Cincinnati*, No. C-1-89-683 (S.D. Oh. April 16, 1991).

JURISDICTION

Respondent adopts the statement of the petitioner.

STATUTES INVOLVED

Respondent adopts the statement of the petitioner.

I. STATEMENT OF THE CASE

A. Introduction

Richard Vogel, an individual white police officer, was delayed for several months in his original appointment as a police recruit. He claims that this short delay was a violation of his constitutional rights because it was caused by the operation of the affirmative action provisions of the consent decree in *United States v. City of Cincinnati*, No. C-1-80-369 (S.D. Oh., August 13, 1981) Consent Decree, Petitioner Appendix 31A. This case does not deserve Supreme Court review. Vogel is wrong when he suggests that there is a split among the Circuits about the rights of applicants for public employment and

wrong when he suggests that review is justified by the determination of the factual findings in this case.

B. Statement of Facts

1. History of the Consent Decree

The City of Cincinnati entered into a consent decree as a settlement of a Title VII pattern and practice suit brought by the Department of Justice on behalf of the United States in 1980. Consent Decree, Petitioner Appendix 31A. The decree was first presented to the court for approval based upon the agreement of the City of Cincinnati and the United States of America. Afterwards, the Fraternal Order of Police intervened in the case and the parties pursued further negotiations. A new decree was presented to and approved by the court effective August 13, 1981, based upon the agreement of all three parties. *Id.*

Under the decree, the City has practiced affirmative action in hiring and promotions within the Police Division. The long term goal of the decree is to:

> insure that blacks and women are not disadvantaged by the hiring, promotion, assignment and other employment policies and practices of the CPD [Cincinnati Police Division] and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunity is provided to all.

Id. at para. 2, Petitioner Appendix 33A.

The goal of the decree will be deemed to have been accomplished when, "subject to the availability of qualified applicants," the proportion "of blacks and women in all the sworn ranks of the CPD" approximates "the proportion of qualified blacks and women in the labor force for the City of Cincinnati." *Id.* Stipulations were filed with the decree that established a prima facie case of both adverse impact and intentional discrimination against blacks and women. Joint Stipulations filed June 25, 1981 (JSI), Petitioner Appendix 21A-27A; Affidavit of Government Expert Vivian B. Toler, Petitioner Appendix 28A-30A; and Joint Stipulations filed July 31, 1981 (JSII) Respondent Appendix 8A-10A.

For example, 33.7% of the applicants for entry level police officer positions were black between the years 1972 and 1979. Only 20% of the appointments, however, were black. The disparity between the expected rate of black appointments and the actual hire rate during this time was 4.7 standard deviations. JSI, para. 16-17, Petitioner Appendix 23A; Toler Affidavit, para. 7, Petitioner Appendix 29A; JSII, para. 37, Respondent Appendix 8A. Moreover, in 1980, only 9.9% of the sworn officers in the Police Division were black while the labor force in the City of Cincinnati was 24% black, JSI, para. 7 and 12, Petitioner Appendix 23A.

The stipulated facts clearly established disparate treatment against women based upon their sex:

> Prior to September of 1974, the CPD limited the opportunities of women in the sworn ranks of the CPD to 10 policewomen positions; required more education of female than male applicants for entry level positions with the CPD; did not

> provide promotional opportunities for women beyond the police specialist rank; and assigned women exclusively to the juvenile division of the CPD.

JSI, para. 18, Petitioner Appendix 23A.

In his petition, the petitioner concedes that this stipulation amounts to an admission of sex discrimination by the City. Petition for Writ of Certiorari, p.19. He then argues that no proof was introduced regarding the present effects of such discrimination in 1989. Petitioner was the party with the burden of proof, so petitioner must live with his own record.

Statistical proof also demonstrates discrimination based upon sex. The disparity between the expected number of female hires from the applicants (which were 22.8% female) and those actually employed from the 1974-75 eligibility list was 3.9 standard deviations. Toler Affidavit, para. 8, Petitioner Appendix 29A; JSII, para. 37, Respondent Appendix 8A. Only 3.4% of the sworn police force was female while the labor force of the City was 42.6% female. JSI, para. 7 and 12, Petitioner Appendix 23A.

2. Operation Of The Hiring Provisions Of The Decree

The decree establishes an interim goal of hiring 34% black and 23% women for the Police Division. That goal was set by matching the percentage of blacks and women to that present on the 1980 recruit list. Consent Decree, para. 2A, Petitioner Appendix 34A. The parties have followed a practice of granting preferences to otherwise qualified blacks and women in order to achieve these

interim goals with each recruit class. If there are insufficient qualified blacks and women, the recruit class proceeds without achieving the goal for that class. Carol Callahan deposition, Respondent Appendix 1A.

If preferences were not extended to qualified blacks and women in the hiring process, all of the candidates would be selected from a single recruit list on which they would be ranked in the order of their written test score, as adjusted for veterans points. City's response to interrogatory 19, Respondent Appendix 6A; Callahan deposition, Respondent Appendix 4A. The City conceded that the validation study done on the selection process for police recruits "doesn't include any analysis of this ranking process." Callahan deposition, Respondent Appendix 4A. Respondent Sentinel Police Association has long contended that the practice of ranking recruits by test score is not job related and has an adverse impact on blacks and women. *See United States v. City of Cincinnati*, 771 F.2d 161 (6th Cir. 1985).

3. Operation Of The Decree With Respect To Vogel

Petitioner Richard Vogel satisfied the requirements of the six parts of the selection process and was ranked no. 41 on the "majority" police recruit list with a score of 88 for exam 89-01. A score of 60 had to be achieved to pass the exam. That passing score applied to whites, blacks and women. Interrogatory Response 15, 16, 17, First Interrogatories to Defendants, Respondent Appendix 5A-65. The first class formed from the group taking exam 89-01 was sworn in on October 9, 1989 and did not include Mr. Vogel. Defendant's Response to Request for Admission

No. 1, Respondent Appendix 7A. The first class did include several blacks and women who scored lower than Mr. Vogel on the written exam. As Vogel states in his petition at page 4, n.1, he did get selected for a subsequent recruit class. Thus, as a result of the operation of the decree, Vogel's hiring was simply delayed; he was not denied employment. *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992).

C. Decisions Below

Richard Vogel brought this action under the Equal Protection Clause and 42 U.S.C. § 1981, not under Title VII. The District Court held that the goals set in the underlying decree in *United States of America v. City of Cincinnati*, No. C-1-80-369 (S.D. Oh., August 13, 1981) had not been achieved and that its application to delay the hiring of Vogel was a valid reason to supersede Ohio civil service law. Summary judgment was denied to Vogel and granted for the respondents. *Vogel v. City of Cincinnati*, No. C-1-89-683 (S.D. Oh., April 16, 1991).

The Sixth Circuit Court of Appeals affirmed. It first held that the Civil Rights Act of 1991 was not retroactive to this case which was argued before the effective date of the act. That issue was not briefed by the parties; was referenced only casually during argument; and is not raised by any of the parties with respect to this petition for certiorari. Therefore, the retroactivity of the 1991 Civil Rights Act should not be reviewed by this Court in this case. The Sixth Circuit also held that Vogel lacked standing to impose his interpretation of the decree on the

parties but had standing to challenge the constitutionality of the decree as applied to him.

On the merits of the case, the Sixth Circuit reviewed many of the facts set out above and concluded that the affirmative action hiring program adopted by the City through the decree was supported by "a strong basis in evidence" and that it was narrowly tailored to achieve the purpose of remedying the "present effects of the City's prior discriminatory hiring practices." *Vogel v. City of Cincinnati*, 959 F.2d 594, 601 (6th Cir. 1992). Vogel did not petition for rehearing *en banc* but filed his petition for certiorari in this court.

II. REASONS FOR DENYING THE WRIT

A. Twelve Recent Decisions From This Court Have Sufficiently Defined The Law On Affirmative Action

Not including school desegregation cases – this court has issued 12 major decisions, in the last fourteen years, which have affected the practice of affirmative action in employment and related areas: No new caselaw is needed in this area: See (1) *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (setting standard under Equal Protection Clause for affirmative action enrollment programs); (2) *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (affirming training program by private employer against Title VII reverse discrimination challenge); (3) *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (affirming federal statute authorizing minority set-asides); (4) *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding,

under Title VII, that affirmative action plan in consent decree could not be interpreted to give blacks preferences in layoffs over incumbent whites holding greater seniority rights); (5) *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that incumbent whites with greater seniority could challenge a collective bargaining agreement under the Equal Protection Clause that extended layoff preference to blacks); (6) *Local Number 93, Int'l Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (rejecting reverse discrimination challenge under Title VII to decree with race conscious promotion provisions); (7) *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (rejecting reverse discrimination challenge by union to 29% membership goal imposed by court under Title VII); (8) *United States v. Paradise*, 480 U.S. 149 (1987) (rejecting reverse discrimination challenge under Equal Protection Clause to race conscious promotion plan imposed as relief for race discrimination); (9) *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987) (rejecting Title VII challenge by male to voluntary affirmative action plan that permitted gender to be considered as a factor in promotions); (10) *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding city minority aside program to be invalid under Equal Protection Clause); (11) *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting white nonparties to consent decrees to challenge race conscious decisions under decrees); (12) *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547 (1990) (rejecting equal protection challenge to federal statutes extending preference to minorities under radio and television licensing statutes).

B. Vogel Fails to Raise an Issue Concerning the Rights of Job Applicants

Vogel claims at pp.10-11 of his petition that there is a split in the Circuits with respect to the rights of *applicants* for public employment who are subject to the provisions of affirmative action plans. He is not correct. He claims that the decision in *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) is somehow inconsistent on this point with the decisions of the Eighth, Seventh and Sixth Circuits in *Donaghy v City of Omaha*, 933 F.2d 1448 (8th Cir. 1991); *Billish v. City of Chicago*, No. 90-1650, No. 90-2182, 1992 U.S. App. Lexis 9262 (7th Cir. May 4, 1992); *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990) respectively. However, the constitutional test for measuring the affirmative action program in *Peightal* was no different than that applied by the other Circuits and quite consistent with the decisions of this Court set out above. In fact, *Peightal* did not focus on the burden on white applicants. Rather, a divided court debated the adequacy of the statistical proof in that case. In general, the only time courts discuss the impact of affirmative action policies on white applicants is after the court has established that there is an adequate factual record of discrimination to permit affirmative action as a remedy. In *Peightal*, the affirmative action hiring plan was affirmed under Title VII but was remanded for further factual development under the Equal Protection theory. Vogel sued only under the Fourteenth Amendment. He did not bring his action under Title VII. Thus, the split Vogel alleges, simply does not exist.

C. Vogel Fails to Raise an Issue Based Upon the Facts

The second reason Vogel cites in support of granting the writ is that, "[T]he Sixth Circuit employed an improper methodology to determine whether there existed statistical proof of discrimination to justify race-based relief." Petition for Writ of Certiorari, p.11. This fact oriented issue does not merit review.

The Sixth Circuit carefully reviewed the relevant cases from this Court in evaluating the statistical disparities relied upon the by the City to justify affirmative action:

> Here the proper statistical comparison is between the race and gender of the Cincinnati Police Division and the race and gender of the relevant qualified labor market. *Croson*, supra, 488 U.S. at 501-02; *Wygant, supra*, 476 U.S. at 275; *Hazelwood, supra*, 433 U.S. at 308.

Vogel 959 F.2d at 600.

Then the Sixth Circuit applied the law to this case. With respect to women, the court noted the direct evidence as well as the statistical evidence of discrimination:

> In the instant case, the City's affirmative action policy with respect to women is clearly justified. In the past the City had limited women to ten positions with the CPD; required more education of female than male applicants for entry level positions with the CPD; prevented women from achieving a rank above that of police specialists; and assigned women exclusively to the juvenile division of the CPD. As of July 1980, only 3.4% of the sworn force of the Cincinnati Police Department were women while women

> constituted 22.8% of the applicants for the force during the period 1974 to February 1980.

Vogel, 959 F.2d at 600. The Sixth Circuit also carefully reviewed the race discrimination facts noting in particular the affidavit of the statistical expert, Vivian Toler, which was filed with the joint stipulations. The Court specifically held that Toler analyzed the statistics according to the "binomial approximation model adopted by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) and *Hazelwood* [*School District v. United States*, 433 U.S. 299, 307-08 (1977)]". *Vogel*, 959 F.2d at 600. Note that this Court recently affirmed the *Hazelwood* statistical test in *Croson*, 488 U.S. at 501.

Petitioner argues that labor force data, such as that which was utilized in *Hazelwood*, may not always provide a precise mirror of those in the community who are qualified for the job. However, this Court has recognized this problem and approved of supplemental studies that focus on applicant flow. *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989). Therefore, to the extent that the Toler affidavit relied upon applicant flow, it was completely consistent with the rulings of this Court.

The Sixth Circuit criticized Vogel for his attack on the statistical analysis: "Vogel points to no statistics that would cast doubt on the validity of the statistics relied upon by the City." *Vogel*, 959 F.2d at 600. Vogel seeks to continue his attack in this court, but he was the plaintiff and he previously failed to meet the burden of proof.

Vogel offered no proof to challenge the extensive statistical evidence and direct evidence of discrimination embraced in the stipulations.

Finally, and most important, findings of fact simply have no place on the docket of this Court. Supreme Court Rule 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925).

D. The Writ Should Not be Granted Based Upon Vogel's Claim of Standing to Enforce His Own Interpretation of the Decree

Vogel, a nonparty to the decree, argues that the decree does not authorize the affirmative action program that the parties have used for more than a decade. The Sixth Circuit, relying on *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) held that Vogel, who was not a party to the consent decree, had no standing to enforce "his own interpretation" of the decree. *Vogel*, 959 F.2d at 598. The Court did recognize Vogel's right to challenge the constitutionality of the decree under *Martin v. Wilks*, 490 U.S. 755 (1989).

The Sixth Circuit ruling follows this court's precedent and needs no review. Moreover, this court's decision in *Martin, supra*, has been overridden by Section 108 of the Civil Rights Act of 1991 so future decisions affecting the rights of nonparties to decrees will be made in light of the legislative history of the Act. This Court should not accept a case now on an issue that is unlikely to recur.

Regardless of the Civil Rights Act, the issue of Vogel's right as a nonparty to the decree to impose his interpretation of the decree on the parties should be

permitted to "percolate" within the federal and state courts to allow a consensus to emerge. Vogel cites no caselaw that discusses this issue and apparently it has not been the subject of other rulings. See Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984).

Finally, Vogel's interpretation of the decree is simply in error. He claims that there is no basis in the decree for establishing separate lists for white males, females and blacks. But the parties stipulated to the practice in 1981 and have used it since. JSII, para. 43, Respondent Appendix 9A. In litigation over the years, the Sixth Circuit has given appropriate weight to the intent of the parties, noting that the decree, including its "preferences to black and female applicants for entry level appointments to the police force" was the result of "extensive negotiations" among the Fraternal Order of Police, the United States Department of Justice and the City of Cincinnati. *United States v. City of Cincinnati*, 771 F.2d 161, 163 (1985). This Court should not enter the debate about the meaning of the terms of this particular decree at this late date in its history.

E. The Writ Should Not be Granted Based Upon Vogel's Individual Claim of Discrimination

The Sixth Circuit correctly described the standard to be applied when an affirmative action plan is challenged under the Equal Protection Clause:

> Any racial classification must be justified by a compelling state interest [citations omitted], and

> the means chosen by the state must be narrowly tailored to achieve that goal. [citations omitted].

Vogel, 959 at F.2d at 599. The court correctly applied that standard. The court established the compelling state interest by reviewing the evidence of discrimination, *infra* at pp. 3-4. Then the court held that this affirmative action plan was narrowly tailored to remedy the discrimination – a conclusion that cannot be seriously challenged by Vogel, whose sole injury is a delay of six months in his hire date to the police department.

Particularly in a complex decree that addresses both hiring and promotion issues, the use of hiring goals has been seen by some members of this Court to be preferable to techniques that burden the rights of incumbent employees. In *Wygant*, for example, the affirmative relief was applied during a layoff in derogation of seniority rights. The Court noted that the burden on innocent white workers was greater in that context than it is in the context of *hiring*. The Court in *Wygant* expressly approved of hiring goals:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job . . .
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of

> achieving racial equality on particular individuals . . . [T]he Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes – *such as the adoption of hiring goals* – are available.

476 U.S. at 282 (plurality opinion) (emphasis added). See also *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (approving a 29% membership goal). The affirmative action plan contained in the decree negotiated by the federal government, the City of Cincinnati and the Fraternal Order of Police in this case is narrowly tailored to appropriately remedy the discrimination in this case.

In summary, none of the issues which petitioner asserts is appropriate for review by this Court. Moreover, none of the alleged divisions among the circuits actually exist. This case merely represents the application of settled principles of law to an individual claim of discrimination. There are no "special" or "important" reasons for granting certiorari in this case. See Supreme Court Rule 10.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied. The decision of the Sixth Circuit Court of Appeals affirming the District Court was correct. Summary Judgment was properly granted by the District Court to Respondents, City of Cincinnati and Intervenor, and properly denied to Petitioner Richard Vogel.

Respectfully submitted,

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APPENDIX

CAROL CALLAHAN DEPOSITION

[p. 21] black and 23 percent were female?

A Correct.

Q Would that be true – how many classes have there been since this class? Any? This is the last class?

A There's a class right now.

Q Right. And the class that is going right now, are the percentages the same?

A No.

Q Why not?

A Because this is a goal for us. We could not meet our goal for the second class, so we went with the remaining individuals on the list.

Q Now, the class before that in 19___ whatever class came immediately before 89-01. Do you know the proportions in that?

A No, I really don't. I could look that up for you, but I'd hate to say it from memory.

Q Would it be correct to state that on the present class that the percentages are different because you simply ran out of the list?

A Right.

Q Of which? Females or black males, or white males?

A Of blacks.

* * *

[p. 28] sworn ranks of the CPD to 10 policewomen positions, required more education of female than male applicants for entry level positions with the CPD, did not provide promotional opportunities for women beyond the police specialist rank, and assigned women exclusively to the juvenile division of the CPD.

For the purpose of this deposition, we will concede that that would be a clear set of discriminatory criteria. Do you know of any criteria like that that applies to black individuals from that period or any time subsequent to that?

A No, I didn't know that either, it was before my time.

Q Are you familiar with something called the standard deviation test, the binomial approximation? Does that mean anything to you?

A No. Are you asking if I know what a stand [sic] deviation is, or you're talking about a specific test?

Q What I am doing is I am reading from an Affidavit of Vivian B. Toler. And she begins describing what she calls the binomial approximation (standard deviation test), which is calculated by taking the square root of the product, so forth. If you are familiar with that, I wanted to ask you some

* * *

[p. 30] created?

A Unless superseded by a consent decree, yes.

Q Okay, thank you.

MR. WYLER: Thank you. I have nothing further.

MR. GERHARDSTEIN: I have a couple of questions.

BY MR. GERHARDSTEIN:

Q Ms. Callahan, in respect to one of Mr. Wyler's questions, you said that exam number 89-01 was validated under the uniform guidelines; is that correct?

A Right.

Q Now, when you talk about validated, would you agree that your validation study applies to the exam and the questions that constitute the exam; is that correct?

A The whole selection process, the exam as well, yes.

Q When you get the results of the written exam, and you add your veteran's preference scores, do you rank people in the order of their exam result plus veteran's preference; right?

A Right.

[p. 31] Q And that ranking goes on to these eligible lists; isn't that correct?

A Correct.

Q Your validation study doesn't include any analysis of this ranking process, does it?

A No.

Q So that the test is valid as a pass-fail test, but not as a ranked test, is it?

MR. WYLER: Objection. Relevancy. Go ahead.

THE WITNESS: We believe that anyone who passes this test meets the minimum qualifications to go on with the process. It's just a very small part of a very large process.

BY MR. GERHARDSTEIN:

Q But for the purposes of the validation study one does under the uniform guideline, the person ranked number one is not more qualified than the person ranked number three, as per the uniform guidelines.

A I agree.

MR. GERHARDSTEIN: I have no further questions.

MR. WYLER: Nothing further.

* * *

CITY'S RESPONSES TO INTERROGATORIES

* * *

Civil Service law of the State of Ohio would be used in order to determine who would be placed in a recruit class.

RESPONSE: The City of Cincinnati did not notify its potential police recruit candidates in writing concerning any system it would use to determine who would be certified to the Police Chief for hiring. Defendant believes that Plaintiff knew the Consent Decree would be used as he participated in the selection process previously and his father is a Cincinnati Police Officer.

15. For white males, what score on examination 89-01 constituted a passing score showing minimal proficiency.

RESPONSE: A score of 60% constituted a passing score for all individuals including white males.

16. For black males, what score on examination 89-01 constituted a passing score showing minimal proficiency.

RESPONSE: A score of 60% constituted a passing score for all individuals including black males.

17. For females, what score on examination 89-01 constituted a passing score showing minimal proficiency.

RESPONSE: A score of 60% constituted a passing score for all individuals including females.

18. Has examination 89-01 been validated pursuant to guidelines of The Equal Employment Opportunity Commission, the Ohio Civil Rights Commission, or any other federal or state governmental agency?

RESPONSE: Yes.

19. Are the scores shown on eligible lists, for Civil Service examinations, intended to show the level of proficiency in the job tested for, without race-based or sex-based bias.

RESPONSE: Written test scores are based upon the number of exam questions answered correctly plus additional credits such as for veteran status. Such examinations are dictated by Ohio Civil Service law, scores are generated as a result of State law and intent must be derived from that law. Scores are one factor in the selection proces [sic] for police recruits.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD VOGEL, Plaintiff, vs. CITY OF CINCINNATI, et al., Defendants.	:	CASE NO. C-1-89-683 (RUBIN, J.) DEFENDANTS' RESPONSE TO REQUEST FOR ADMISSIONS

Plaintiff hereby propounds pursuant to Ohio Rule 36(A) the following Requests for Admission. Each Defendant shall separately state to each Request whether it is "admitted" or "denied" or otherwise indicate his Answer in compliance with Ohio Civil Rule 36.

Each Admission shall be made in the space provided herein, in writing and under oath, within 28 days from the date of service hereof.

These Requests for Admissions are to be considered as continuing in nature so that if any information is discovered after the initial response, you are obligated to furnish to the Plaintiff.

REQUEST FOR ADMISSIONS

1. On October 9, 1989, the City of Cincinnati swore in a new police recruit class.

RESPONSE: Admitted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	:	CIVIL NO. C-1-80-369
Plaintiff,	:	
v.	:	
CITY OF CINCINNATI, OHIO et al.	:	
Defendant.	:	

JOINT STIPULATIONS AMONG THE UNITED STATES, THE CITY OF CINCINNATI, MEMBERS OF THE CINCINNATI CIVIL SERVICE COMMISSION, AND QUEEN CITY LODGE NO. 69, FRATERNAL ORDER OF POLICE

(Filed July 31, 1981)

All parties to the above styled action agree to the following stipulations for the purposes of this action only:

The parties, and all of them, stipulate to the facts contained in the Joint Stipulations of Fact Between the United States and the City of Cincinnati, filed June 25, 1981 (copy attached and incorporated by reference herein), with the exception of stipulation number 36, which is hereby modified as follows and agreed to among all parties:

36. Following the lay-off of sworn police personnel in 1976, and until early 1980, the City of Cincinnati filled

entry-level vacancies in the sworn ranks of the Cincinnati Police Division only by recalling officers from lay-off.

37. The parties, and all of them, hereby stipulate to the facts contained in the affidavit of Vivian B. Toler, served and filed on June 26, 1981. A copy of the affidavit is attached and incorporated by reference herein.

38. The parties, and all of them, hereby stipulate that all documents listed as exhibits by plaintiff United States and Exhibits F-A, F-B, F-C, F-D, F-E, F-G, and F-I of defendant Queen City Lodge No. 69, Fraternal Order of Police (hereinafter FOP), are admissible except as to relevancy and agree that copies may be rendered in place of the originals.

39. On March 3, 1980, the City Manager of Cincinnati Mr. Sylvester Murray, sent a written memorandum to the Mayor and members of City Counsel, setting forth the background of the then current labor negotiations with the FOP, the proposed settlement, items which were not to be included in the written contract, and some personal comments (FOP Exhibit F-E).

40. On March 3, 1980, the City Manager of the City of Cincinnati, Mr. Sylvester Murray, sent a directive to the Safety Director of the City of Cincinnati indicating that the Chief of Police was to maintain a civil service promotable position or positions at Police Specialist rate of pay and at the level existing on January 1, 1980, which level was 152. (FOP Exhibit F-G).

41. Subsequent to March 3, 1980, but prior to November of 1980, the membership of the FOP, meeting in special session, ratified the contract between the FOP

and the City, consisting of the provisions contained in the memorandum from the City Manager to City Council dated March 3, 1980, including provisions a-c under "Other Items Not Part of the Written Contract" on page 3 of the memorandum, (FOP Exhibit F-E).

42. Subsequent to March 3, 1980, but prior to November of 1980, the members of the Cincinnati City Council approved the actions of the City Manager which are set forth in the memorandum from the City Manager to City Council dated March 3, 1980, including provisions a-c under "Other Items Not Part of the Written Contract" on page 3 of the memorandum, (FOP Exhibit F-E).

43. Although prior to the enactment in 1979 of the Bowen Amendment, Section 124.90 of the Ohio Revised Code, the City filled vacancies pursuant to Sections 124.27 and 124.44, it invoked the Bowen Amendment for entry-level hiring in 1981 and filled positions in the Cincinnati Police Division out of rank order of score from three separate eligibility lists; one for white males, one for black males and one for females.

44. No vacancies have been filled in the ranks of Police Specialist or Police Sergeant on the Cincinnati Police Division since the enactment in 1979 of the Bowen Amendment, Section 124.90 of the Ohio Revised Code.

/s/ Nicholas J. Pantel
NICHOLAS J. PANTEL
Assistant U.S. Attorney

/s/ Donald E. Hardin
DONALD E. HARDIN
Counsel for Defendant FOP

/s/ Katherine P. Ransel
KATHERINE P. RANSEL
Department of Justice
Washington, D.C. 20530

/s/ Paul R. Berninger
PAUL R. BERNINGER
Asst. City Solicitor

No. 91-2001

Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

RICHARD VOGEL

Petitioner,

vs.

CITY OF CINCINNATI,
SCOTT JOHNSON, CITY MANAGER,
CIVIL SERVICE COMMISSION
OF THE CITY OF CINCINNATI,
LAWRENCE WHALEN,
POLICE CHIEF OF THE CITY OF CINCINNATI
and
THE SENTINEL POLICE ASSOCIATION

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

REPLY TO BRIEFS OF RESPONDENTS CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, LAWRENCE WHALEN AND THE SENTINEL POLICE ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. When no hiring or promotional quota is authorized by a voluntary consent decree entered into by a political subdivision, does the Fourteenth Amendment to the United States Constitutional permit that political subdivision to create a quota, which imposes a societal burden on innocent individuals, in order to meet certain goals for hiring and promoting blacks and females.

TABLE OF AUTHORITIES

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Respondents' briefs raise a number of arguments as to why the legal issues raised by Petitioner in support of his Writ of Certiorari are not sufficiently novel to warrant

Supreme Court consideration. Petitioner shall briefly address and respond to each of these arguments in turn.

I. In denying that a quota system has been instituted in order to fulfill the goals of the consent decree, Respondents are engaged in semantics. The City's own officials verified that the goals of the consent decree were implemented by a quota system. In the deposition of Scott Johnson, the City Manager of the City of Cincinnati, the following exchange took place.

> Q. Would it be correct to say that prior to hiring a class, specific percentages of white males, black males, and females are predetermined?
>
> A. Yes.

(Deposition of Scott Johnson page 22, Petitioner Appendix 1A).

Note also the deposition testimony of Carol Callahan, the Senior Personnel Analyst for the City.

> Q. How is it then determined how many white males, black males and females would be in the class?
>
> A. The percentages is (sic) as outlined in this consent decree. It is 34% black, 23% female.
>
> . . .
>
> Q. Now, would it be correct then to presume that in this particular class, 34% were black and 23% were female?
>
> A. Correct.

(Deposition of Carol Callahan, pages 20-21, Petitioner Appendix 2A-3A).

Both the City Manager and the Senior Personnel Analyst agree that the recruit lists are divided into a white male list, a black male list and a female list. They also agree that the percentages taken from those lists are without regard to the individual score, when compared to individuals on the other lists.

Respondent City's minimization of the written examination as merely one portion of the selection process is merely a smokescreen. It is the written examination scores which determine an individual's rank on the eligible list. And this list ultimately determines the order in which such individuals are certified to the police chief for hiring consideration.

There is also no support for Respondents' claim that the examination tests "minimum" qualifications. Quite the contrary, Ohio Revised Code § 124.26 clearly states that the ranking in order of excellence, based upon test score, is the determining factor as to who is to be certified for hiring consideration.

In sum, Respondent City has not set up mere "goals" for hiring blacks and females. It has set aside an inflexible predetermined number of slots in the police recruit class for minority and female individuals. This is no less a set-aside or quota than the set-asides and quotas condemned by the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).[1]

---

[1] Respondent Sentinel Police Association concedes the point when it characterizes the City's hiring scheme as "a practice of granting preferences . . . to . . . blacks and women." (Brief of Respondent Police Sentinels at 4).

II. One of the key issues upon which Petitioner seeks a Writ of Certiorari is the proper methodology for establishing past discrimination by a municipal entity which would justify the imposition of race-conscious relief. Petitioner argues for a comparison of the percentage of minorities in the at-issue skilled jobs with the percentage of minorities in a *qualified* labor pool. On the other hand, Respondents City and Police Sentinels argue – and the Sixth Circuit held – that the percentage of blacks and females in the at-issue jobs may be compared with the percentage of black and female *applicants* for those jobs.

As if to trivialize Petitioner's petition, Respondent Police Sentinels downplay this issue as a mere "fact oriented issue" (Respondent Police Sentinel's Brief at 10). Nothing could be further from the truth. The proper formula for analyzing race and sex-based statistics is of paramount concern for all public employers in crafting their hiring and promotional policies. The correct methodology for utilizing statistics also forms an indispensable guideline for public employees and prospective public employees in determining whether discrimination has occurred and how they must go about proving it. The proper use of statistics has provided grist for countless Supreme Court decisions in this area over the past several years. *See, e.g., Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989); *Hazelwood School District v. United States,* 433 U.S. 299 (1977). *Casteneda v. Partida,* 430 U.S. 482 (1977). Thus, in the instant case, whether the City of Cincinnati can justify the composition of its police recruit class by comparing it to the racial and sexual configuration of its applicant pool, as opposed to a pool of qualified candidates, for the position of police recruit is clearly a

question of law. Important constitutional rights of both minority and non-minority recruit candidates as well the integrity of the City's hiring policies turn on the resolution of this altogether crucial issue.

Respondent Police Sentinel's citation of *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650 (1989) as authority for the City's reliance on "applicant flow" statistics is unwarranted. At no time does the Court endorse reliance on mere "applicant flow". Rather, *Wards Cove* is replete with admonitions that discrimination through statistics can only be shown by comparing the percentage of minorities in the at-issue jobs with the percentage of minorities in a qualified labor pool. *See also Hazelwood School District v. United States,* 433 U.S. at 308 n. 13. It is not hard to envision why "applicant flow" would be an unreliable comparison when the at-issue jobs are skilled. Anybody can apply for a skilled job. In any given year, a disproportionate number of unqualified individuals might apply from any minority or ethnic group. To force a city to thus construct its recruit class according to the percentage of minorities in such an applicant pool would not serve the public interest.

III. As was fully argued in Petitioner's Petition for Writ of Certiorari, the Supreme Court has yet to address the constitutionality of public sector affirmative action programs in the context of hiring of applicants for public employment. Respondent Police Sentinels correctly cites the several seminal decisions recently handed down by the Supreme Court in the area of affirmative action. Yet it offers no explanation of its curious and self-serving remark that "no new case law is needed in this area". (Respondent Police Sentinel's brief at 7.)

In any event, this court has not handed down any significant ruling in the area of affirmative action since it struck down racial set-asides three years ago in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Since that time the Sixth, Seventh and Eighth Circuits have addressed the issue of affirmative action in the hiring context, and have upheld affirmative action plans which contain predetermined racial and sexual set-asides in entry level recruit classes. However, notwithstanding arguments by the Respondent Police Sentinels to the contrary, *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) does represent an inclination by the Eleventh Circuit to go the other way. In *Peightal* the Court ruled that such racial set-asides raised serious issues of Fourteenth Amendment deprivation. The time is thus ripe for this Court to establish guidelines as to when hiring quotas and set-asides pass constitutional muster.

Respondent Police Sentinels' reliance on *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), underscores further the need for Supreme Court elucidation in this area of the law. Respondent argues that *Wygant* gives public employers *carte blanche* authority to implement hiring quotas. (Respondent Police Sentinels' Brief at 14-15.) However, *Wygant* never went that far. It merely contains *dicta* to the effect that candidates for public employment may enjoy a lesser degree of constitutional protection than do incumbent public employees. The Court never defined "lesser degree". It did not describe the extent to which the "strict scrutiny" standard should be relaxed in the case of applicants for public employment. *City of Richmond v. J.A. Croson Co.*, which, like this

case, involves an application by outsiders for governmental benefits (a public contract rather than public employment), strongly suggests no relaxation at all. This is precisely why this case is an ideal vehicle for the Supreme Court to provide valuable guidance to both public employers and applicants for public employment.

IV. Respondents argue that the "standing" issue raised in the Petition for Writ of Certiorari is not worthy of Supreme Court review inasmuch as *Martin v. Wilks*, 490 U.S. 755 (1989) has been somehow vitiated by Section 108 of the Civil Rights Act of 1991. However, Section 108 only applies to the right of non-parties to challenge decrees as violative of that statute. It does not, and can not, speak to the right of individuals to raise *constitutional* challenges to consent decrees to which they were not a party.

Furthermore, Respondent Police Sentinels incorrectly characterizes the "standing" issue as the right of a non party to *interpret* a consent decree as opposed to the right of a non party to *challenge* the constitutionality of a consent decree, the latter which Respondents concede. However, this case really does not involve consent decree interpretation at all. The challenged quotas themselves were outside the four corners of the consent decree. The implementation of a black list, a female list and a white list and the taking of a predetermined number of individuals from each list, was never provided for in the decree. Petitioner is in reality challenging the constitutionality of personnel policies undertaken by the City which are apart from and independent of the consent decree. No interpretation of existing decree language is implicated.

V. In a last ditch effort to downplay the constitutional importance of the issues raised by Petitioner, Respondents argue that the rights of "only" one individual are at stake. However, cases should not be deemed less worthy for Supreme Court review merely because only one individual has been deprived of important constitutional rights. The fact that one non-minority applicant sued for denial of a place in a medical school class did not dissuade the Supreme Court from ruling in *Board of Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that his Fourteenth Amendment rights had been violated. Indeed, the annals of Supreme Court decisions contain numerous cases in which the Court has broken new ground in the area of constitutional law where only one individual was injured. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Equally troubling is Respondent Police Sentinels' argument that this case is not worthy of Supreme Court review because the Petitioner ultimately obtained a position in a subsequent recruit class. Respondent Police Sentinels would have this court ignore the injury Petitioner has suffered by being deprived of his rightful place in the first recruit class. For the remainder of his career in the Police Division, Petitioner will be irreparably harmed. He will always possess less seniority than he would have had if he had been admitted into the first recruit class. Thus Petitioner will be more vulnerable to lay off, and will also lag behind his peers in the first recruit class in the accumulation of on-the-job experience, which is so necessary to achieve promotion to a higher rank.

In sum, the Supreme Court should grant Petitioner a Writ of Certiorari. Respondents have advanced no cogent

argument as to why the case should not be accepted for Supreme Court consideration.

Respectfully submitted,

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DEPOSITION OF SCOTT JOHNSON

* * *

[p. 22] would that help you?

A First paragraph on page two?

Q On page three, the beginning of section number two. The first paragraph of section number two on page three.

A No.

Q There's no date indicated?

A I see no date in the first paragraph of page three.

Q And do you know if a date is indicated anywhere within this document?

A No.

Q Therefore, once again in terms of meeting the goal that you talk about how are the percentages of each class determined?

MR. GERHARDSTEIN: Objection. Asked and answered.

BY MR. WYLER:

Q Go ahead.

A I don't know.

Q Would it be correct to say that prior to hiring a class, specific percentages of white males, black males, and females are predetermined?

A Yes.

Q Would you please point out to me in the

* * *

DEPOSITION OF CAROL CALLAHAN

* * *

[p. 20] Q And you're familiar with the consent decree?

A Right.

Q Would you point out to me the place in the consent decree that authorizes dividing the lists by race and sex?

A I don't believe there is any place in the consent decree where it speaks to the list, one list or three.

Q Once it is determined – let us take 89-01 as an example, since it's the key class for this litigation – once it was determined the number to be in that class, which I believe was 50; is that correct?

A Yes.

Q How is it then determined how many white males, black males and females would be in the class?

A The percentages is as outlined in this consent decree. It's 34 percent black, 23 percent female.

Q Would you show me that in the consent decree? What page are you on?

A Three.

Q Now, would it be correct then to presume that in this particular class, 34 percent were [p. 21] black and 23 percent were female?

A Correct.

Q Would that be true – how many classes have there been since this class? Any? This is the last class?

A There's a class right now.

Q Right. And the class that is going right now, are the percentages the same?

A No.

Q Why not?

A Because this is a goal for us. We could not meet our goal for the second class, so we went with the remaining individuals on the list.

Q Now, the class before that in 19___ whatever class came immediately before 89-01. Do you know the proportions in that?

A No, I really don't. I could look that up for you, but I'd hate to say it from memory.

Q Would it be correct to state that on the present class that the percentages are different because you simply ran out of the list?

A Right.

Q Of which? Females or black males, or white males?

A Of blacks.

* * *